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IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-1403

FORBES LEASING AND FINANCING CORPORATION,
Petitioner,

v.

MARVIN LEBOWITZ,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

Page

I. Opinions Below 1

II. Jurisdiction 2

III. Questions Presented 2

IV. Rules of Civil Procedure and Constitutional Provisions Involved 4

V. Statement of the Case 5

VI. Reasons for Granting the Writ 8

A. The Judges Below Believed the Pennsylvania Attachment Rules to Be Unconstitutional and Declined to So Rule Because of Certain Precedents of This Court Whose Status Is Now in Doubt Due to the Recent Decision in *Sniadach* 8

1. Pennsylvania's Foreign Attachment Rules as a Jurisdictional Device Are Unconstitutional Where Personal Jurisdiction Is Otherwise Available 9

2. Pennsylvania's Foreign Attachment Rules as a Pre-Judgment Security Device Are Unconstitutional Because They Exceed Legitimate Creditor Interests and Lack Procedural Safeguards 13

B. The Decision Below Conflicts Squarely With a Decision of the California Supreme Court on an Important Issue of Federal Constitutional Law 14

C. This Court's Decisions and Opinions in *Ownbey v. Morgan* and *McKay v. McInnes* Are in Conflict With the Concept of Due Process of Law Articulated in Recent Decisions of This Court Which Require Notice and Hearing Before a Deprivation of Property 16

D. Pennsylvania's Foreign Attachment Procedure Raises Important Questions Under the Fourth Amendment . 20

VII. Conclusion 22

INDEX (Continued).

	Page
APPENDIX A	A1
Opinion of United States Court of Appeals for the Third Circuit	A1
Concurring Opinion of Judge Gibbons	A6
Judgment of United States Court of Appeals for the Third Circuit	A8
Opinion of the United States District Court for the Eastern District of Pennsylvania	A10
Order of the United States District Court for the Eastern District of Pennsylvania	A51
Order of the United States District Court for the Eastern District Amending Order of April 15, 1971	A52
United States Constitution:	
Article I, Section 8	A53
Amendment IV	A53
Amendment V	A53
Amendment XIV	A53
Federal Rules of Civil Procedure, Rule 64	A55
Pennsylvania Rules of Civil Procedure, Rules 1251 to 1279, inclusive	A56

TABLE OF CITATIONS.

Cases: Page

Aguilar v. Texas, 378 U. S. 108 (1964) 20
Bell v. Burson, 402 U. S. 535 (1971) 12, 16, 18
Boddie v. Connecticut, 401 U. S. 371 (1971) 12, 16, 17, 18
Camara v. Municipal Court, 387 U. S. 523 (1967) 20, 21
Coolidge v. New Hampshire, 403 U. S. 443 (1971) 20
Ewing v. Mytinger & Casselberry, Inc., 339 U. S. 594 (1950) . 12
Goldberg v. Kelly, 397 U. S. 254 (1970) 12, 16, 18
Groppi v. Leslie, — U. S. —, 40 U. S. L. W. 4149 (1972) .. 18
International Shoe Co. v. Washington, 326 U. S. 310 (1945) 11, 17, 18
Katz v. United States, 389 U. S. 347 (1967) 20
Ker v. California, 374 U. S. 23 (1963) 20
Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N. D. N. Y. 1970) 20, 21
Lynch v. Household Finance Corp., — U. S. —, 40 U. S. L. W. 4335 (1972) 19, 21
Mancusi v. DeForte, 392 U. S. 364 (1968) 21
Mapp v. Ohio, 367 U. S. 643 (1961) 20
McInnes v. McKay, 127 Me. 110, 141 A. 699 (1928) 18, 19
McKay v. McInnes, 279 U. S. 820 (1929) 2, 3, 6, 8, 12, 14, 15, 16, 17, 18, 19
North American Cold Storage Co. v. Chicago, 211 U. S. 306 (1908) 12
Ownbey v. Morgan, 256 U. S. 94 (1921) 2, 3, 6, 8, 12, 14, 15, 17, 18, 20
Pennoyer v. Neff, 95 U. S. 714 (1887) 20
Randone v. The Appellate Department of the Superior Court of Sacramento County, 5 Cal. 3d 536, 96 Cal. Rept. 709, 488 P. 2d 13 (1971) petition for cert. filed sub nom., Northern California Collection Service, Inc. v. Randone, 40 U. S. L. W. 3375 (U. S. Jan. 11, 1972) (No. 71-898) 15, 19
See v. Seattle, 387 U. S. 541 (1967) 20
Sniadach v. Family Finance Corp., 395 U. S. 337 (1969) ..2, 3, 6, 8, 9, 12, 15, 16, 17, 18, 19

TABLE OF CITATIONS (Continued).

Cases (Continued): Page

Spinelli v. United States, 393 U. S. 410 (1969) 20
Tucker v. Burton, 319 F. Supp. 567 (D. D. C. 1970) 19
Wenzel v. Morris Distributing Co., 439 Pa. 364, 266 A. 2d 662 (1970) 17
Wyman v. James, 400 U. S. 309 (1971) 22

Statutes:

28 U. S. C. § 1254(1) 2
28 U. S. C. § 1292(b) 6
Pa. Stat. Tit. 15, § 2011 (1968) 10, 18

Rules of Civil Procedure:

Pennsylvania Rules of Civil Procedure:
Rules 1251 through 1279, inclusive 4, 5
Rule 1286 13
Rule 1287 14
Federal Rules of Civil Procedure, Rule 64 4

United States Constitution:

Article I, Section 8 4
Fourth Amendment 4, 21, 22
Fifth Amendment 4
Fourteenth Amendment 4

Miscellaneous Authorities:

Carrington, The Modern Utility of Quasi In Rem Jurisdiction, 76 Harv. L. Rev. 303 (1962) 19
Comment, Attachment in California: A New Look at an Old Writ, 22 Stan. L. Rev. 1254 (1970) 19
Comment, Expanding Limitations on Prejudgment Attachment: Reverberations of Sniadach v. Family Finance Corp., 12 B. C. Ind. & Com. L. Rev. 700 (1971) 19

TABLE OF CITATIONS (Continued).

Miscellaneous Authorities (Continued): Page

Comment, Some Implications of Sniadach, 70 Colum. L. Rev. 942 (1970) 19

Comment, The Constitutional Validity of Attachment in Light of Sniadach v. Family Finance Corp., 17 U. C. L. A. L. Rev. 837, 844 (1970) 16, 19

Note, Attachment and Garnishment, 68 Mich. L. Rev. 986 (1970) 19

Note, Garnishment Statutes and Due Process: The Effect of Sniadach v. Family Finance Corporation, 7 Harv. J. Legis. 231 (1970) 19

Note, Summary Prejudgment Wage Garnishment Held Unconstitutional, 1969 Duke L. J. 1285 ..... 16, 19

Note, Some Implications of Sniadach, 70 Colum. L. Rev. 942 (1970) 14, 19

The Supreme Court, 1968 Term, 83 Harv. L. Rev. 113 (1969)

Note, 1970 Wis. L. Rev. 181 19

10 Standard Pennsylvania Practice 44 20

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No. 71- .

FORBES LEASING AND FINANCE CORPORATION,
Petitioner,

v.

MARVIN LEBOWITZ,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Forbes Leasing and Finance Corporation hereby petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on February 24, 1972.

I. OPINIONS BELOW.

The opinion of the District Court is reported at 326 F. Supp. 1335, and is printed in Appendix A, pp. A10-A50. The majority and concurring opinions of the Court of Appeals are not yet officially reported but are printed in Appendix A, pp. A1-A6, and pp. A6-A7 respectively.

II. JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on February 24, 1972, Appendix A, pp. A8-A9. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

III. QUESTIONS PRESENTED.

This petition raises the first post-*Sniadach*[1] challenge to the constitutionality of Pennsylvania's foreign attachment procedures. Those procedures provide for commencement of an action by seizure of property on a perfunctory writ issued automatically by the prothonotary [court clerk] at the request of plaintiff's counsel and its service by the sheriff, without any prior notice to the defendant, without any prior hearing, without any affidavit of meritorious action, without the prior posting of any bond and without any prior intervention by any judicial officer. The attachment may precede the filing of the complaint by as much as five days. The attachment is not dissolved by the general appearance of the defendant, and, unless a bond in double the amount claimed or equivalent security is posted, the attachment remains in effect until final disposition of the case. All of the four Judges below believed that Pennsylvania's foreign attachment scheme was for various reasons repugnant to the United States Constitution but felt constrained to uphold it only because of the failure of this Court to state in *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969) that *Ownbey v. Morgan*, 256 U. S. 94 (1921) and *McKay v. McInnes*, 279 U. S. 820 (1929) were overruled. Therefore, the following questions are presented:

1. *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969).

(1) Whether Pennsylvania's rules of foreign attachment, used as a jurisdictional device, violate the Due Process and Equal Protection Clauses of the 14th Amendment in that they authorize the attachment of a non-resident's property, without procedural safeguards, even though the non-resident by long-arm statute or general appearance is as subject to *in personam* jurisdiction as a resident?

(2) Whether Pennsylvania's rules of foreign attachment, used as a prejudgment security device, violate the Due Process and Equal Protection Clauses of the 14th Amendment by providing that an attachment continue after a non-resident's appearance even though there is generally no valid creditor interest justifying such continuation and such prejudgment security is permitted against residents only in exceptional circumstances?

(3) Whether *Ownbey v. Morgan*, 256 U. S. 94 (1921) and *McKay v. McInnes*, 279 U. S. 820 (1929) survive this Court's decision in *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969)?

(4) Whether the seizure of property without a warrant and supporting affidavits and without any prior intervention of an independent judicial officer violates the Fourth Amendment's prohibition against unreasonable seizures?

IV. RULES OF CIVIL PROCEDURE AND CONSTITUTIONAL PROVISIONS INVOLVED.

The Rules of Civil Procedure and Constitutional Provisions involved are cited here and fully set forth in the Appendix A:

(1) Pennsylvania Rules of Civil Procedure, Foreign Attachment, Rule 1251 through 1279, inclusive; App. A56-A70;

(2) Federal Rules of Civil Procedure, Rule 64; App. A55;

(3) United States Constitution

(a) The Commerce Clause; App. A53;

(b) The Fourth Amendment; App. A53;

(c) The Fifth Amendment; App. A53;

(d) Section One, Fourteenth Amendment; App. A53-A54.

V. STATEMENT OF THE CASE.

On January 27, 1971 respondent Marvin Lebowitz ("Lebowitz") commenced an action in Philadelphia's Court of Common Pleas against, *inter alia*, the petitioner Forbes Leasing and Finance Corporation ("Forbes") a Delaware corporation which petitioner concedes does business in Pennsylvania. On February 1, 1971, Lebowitz, pursuant to Pennsylvania's Rules of Civil Procedure,[2] caused the prothonotary [clerk] of the Court of Common Pleas to issue a Writ of Foreign Attachment in the amount of $200,000 against Forbes. This writ, served by the sheriff upon two Philadelphia banks, caused the seizure of 40% of Forbes' assets, cash in bank accounts in an amount in excess of $75,000. In accordance with the Pennsylvania Rules, this seizure of property was accomplished without any prior notice to Forbes, without any prior hearing, without any affidavit of meritorious action or the appropriateness of the $200,000 attachment, without the prior posting of any bond, without any prior intervention of any judicial officer. Instead only the perfunctory issuance of the writ by the prothonotary and service by the sheriff preceded this seizure of property.

The action was removed to the Federal Court on the basis of diversity and all defendants[3] including Forbes entered a general appearance, thereby conceding personal jurisdiction. Since Rule 64 of the Federal Rules incorporates Pennsylvania's Attachment Rules, the general appearance did not dissolve the attachment, which will remain in full force until final disposition on the merits, unless substituted security or a bond is filed.

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2. Pa. R. C. P., Rules 1251 through 1279 inclusive; App. A-56-A70.

3. Other defendants are named in the complaint. Their status, however, is not pertinent to the disposition of this petition. *See* App. A1, n.1.

Forbes filed a motion to quash the attachment on the ground that it violated the Constitution. District Court Judge Edward R. Becker, in a scholarly opinion, denied Forbes' motion but expressed "grave doubts" as to the constitutional validity of Pennsylvania's Foreign Attachment Rules. However he felt foreclosed from ruling them invalid because some types of attachment had been approved by this Court in *Ownbey v. Morgan*, 256 U. S. 94 (1921) and *McKay v. McInnes*, 279 U. S. 820 (1929). In light of this Judge Becker said:

> "The thrust of the analysis contained in this opinion is directed to the theory that, were it to have *Ownbey* and *McKay* before it directly today, the United States Supreme Court might well decide them differently. . . . [A] United States District Judge is not at liberty to ignore their precedential effect. [T]here is every reason to believe that the Supreme Court will soon have an opportunity to rule upon and reconsider, if it wishes, the doctrine of *Ownbey* and *McKay*. In view, then, of the references in *Sniadach* to *Ownbey* and *McKay*, we hold that the Pennsylvania foreign attachment rules are valid." App. A-46.

Pursuant to 28 U. S. C. §1292(b) the issue was presented to the United States Court of Appeals for the Third Circuit. Chief Judge Seitz and Judge Kalodner believed the Pennsylvania Foreign Attachment scheme to be unconstitutional, in part, but said:

> "[W]e are not free to adopt our own view . . . because we think the reasoning of the Supreme Court's decisions in *Ownbey* . . . and *McKay* . . . precludes such action. Any reexamination of the continuing vitality of these cases must come from the Supreme Court." App. A-6.

Circuit Judge Gibbons said concurring:

"I am troubled by the result in this case even though I agree that under the governing precedents in the Supreme Court we must affirm." App. A6-A7.

This Petition is presented in order to obtain a resolution of conflicts among the various opinions of this Court, resolution of a Federal Constitutional Law conflict between the Supreme Court of California and the Court of Appeals for the Third Circuit, and refinement of this Court's definition of extraordinary and emergency circumstances justifying a seizure without notice and a prior adversary hearing, and a vindication of important Due Process, Commerce, Equal Protection and Fourth Amendment rights, which the Pennsylvania procedure violates.

VI. REASONS FOR GRANTING A WRIT OF CERTIORARI.

A. The Judges Below Believed the Pennsylvania Attachment Rules to Be Unconstitutional and Declined to So Rule Because of Certain Precedents of This Court Whose Status Is Now in Doubt Due to the Recent Decision in *Sniadach*.

Judge Becker in the District Court (App. A46), as well as the three members of the Court of Appeals (App. A6, A7) who heard this case indicated that if they were at liberty to do so, they would hold the Pennsylvania Rules of Foreign Attachment, as presently written, unconstitutional. However, both in the District Court and in the Court of Appeals, the judges felt themselves unable to do so because this Court in *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969), cited its earlier decisions in *Ownbey v. Morgan*, 256 U. S. 94 (1921), and *McKay v. McInnes*, 279 U. S. 820 (1929), and did not state they were overruled.[4] In the District Court, Judge Becker anticipated that this Court would resolve the issue of whether *Ownbey* and *McKay* are still the law in view of its subsequent decision in *Sniadach*. He stated:

> "In view, however, of the language of *Sniadach*, which, at least, recognizes the vitality of *Ownbey* and *McKay*, even if it does not impliedly approve of them, a United States District Judge is not at liberty to ignore their precedential effect. In view of the increasing volume of litigation in this field, there is every reason to believe that the Supreme Court will soon have an opportunity to rule upon and reconsider,

4. The conflict between these older decisions and the more recent decisions of this Court are discussed at page 16, *infra*.

if it wishes, the doctrine of *Ownbey* and *McKay.*" App. A46.

Likewise, Chief Judge Seitz, speaking for the Court of Appeals, stated:

> "But we are not free to adopt our own view as to post-appearance attachment. We say this because we think the reasoning of the Supreme Court's decision in *Ownbey v. Morgan*, 256 U. S. 94 (1921) and *McKay v. McInnes*, 279 U. S. 820 (1929) precludes such action. Any re-examination of the continuing vitality of these cases must come from the Supreme Court." App. A6.

As the Court of Appeals found, "the effect of a Pennsylvania attachment is to immobilize a defendant's property at the instance of a claimant who is not required to make a showing of even a colorable claim. This consequence, in and of itself, may critically impair the defendant's ability to participate effectively in judicial proceedings designed to resolve the dispute between the parties." App. A4. In view of this impact, the issue of constitutionality turns on whether there is a "situation requiring special protection of a state or creditor interest," and whether the Pennsylvania Rules are "narrowly drawn to meet any such unusual conditions." *Sniadach v. Family Finance Corp.*, 395 U. S. 337-339. As both the District Court and the Court of Appeals found in this case, the Pennsylvania rules do not satisfy the *Sniadach* test.

1. Pennsylvania's Foreign Attachment Rules as a Jurisdictional Device Are Unconstitutional Where Personal Jurisdiction Is Otherwise Available.

The state has a valid interest in protecting its residents so that they may assert within the state claims against non-residents doing business within the state. But peti-

tioner submits that the Pennsylvania Rules of Foreign Attachment cannot be constitutionally sustained as a jurisdictional device where there is a clear basis for personal jurisdiction over the defendant either by virtue of a Long-Arm statute or after defendant's general appearance in the action.

The District Court found that Pennsylvania's rules are overly broad because they do not exclude from their orbit situations, as in the instant case, in which the defendant was doing business in the Commonwealth and was therefore subject to *in personam* jurisdiction under Pennsylvania's Long-Arm statute (App. A37). The Court of Appeals believed that the provision of an "immediate and certain basis" for jurisdiction justified prejudgment attachment even when long-arm jurisdiction might be available.[5] The Court concluded, however, that generally the compensating state interest justifying foreign attachment no longer existed after the defendant entered a general appearance. Speaking for the Court, Chief Judge Seitz concluded:

> "Of course, Forbes implies that after its general appearance there no longer existed any justification for the attachment. We agree that, typically, after a party whose property has been attached enters a general appearance the compensating governmental

5. App. A6. Even assuming that foreign attachment might be justified as a basis for jurisdiction in close cases to avoid the necessity for litigation, Pennsylvania's long-arm statute for corporations is so broad—encompassing virtually any act within the Commonwealth—that it would be an extraordinary situation in which a corporate defendant had tangible or intangible property in Pennsylvania but was not subject to long-arm jurisdiction. Pa. Stat. Tit. 15, § 2011 (1968). That being so, the foreign attachment rules are overly broad because they do not isolate such unusual cases by allowing attachment only when the plaintiff is able to demonstrate, to the satisfaction of the court, significant doubt as to availability of personal jurisdiction over the defendant.

interest which supports foreign attachment loses its vitality. See *Boddie v. Connecticut,* [401 U. S. 371 (1971)]. Of course, exceptional circumstances might arise, where a plaintiff may demonstrate that release of the property attached would pose a reasonable possibility that any judgment thereafter obtained would go unsatisfied." App. A6.

Judge Gibbons, in his concurrence, was even more emphatic on this point. He noted that the earlier Supreme Court precedents antedated the decision in *International Shoe Co. v. Washington,* 326 U. S. 310 (1945) which laid the basis for modern long-arm statutes, and he found no justification whatsoever for continuing an attachment after a foreign defendant made an appearance:

"I am troubled by the result in this case even though I agree that under the governing precedents in the Supreme Court we must affirm. *Pennoyer v. Neff,* 95 U. S. 714, 714 (1877); *Ownbey v. Morgan,* 256 U. S. 94 (1921); *Coffin Brothers v. Bennett,* 277 U. S. 29 (1928); *McKay v. McInnes,* 279 U. S. 820 (1929). All of these decisions antedate the decision in *International Shoe Co. v. Washington,* 326 U. S. 310 (1945), which gave impetus to the adoption of modern long arm statutes. Whatever may be said in justification of permitting the states to use foreign attachment as an inducement to a foreign defendant to refrain from litigating the jurisdictional facts underlying the state's in personam jurisdiction over him, nothing can be said in justification of continuing the attachment after a foreign defendant makes a general appearance. A foreign defendant who has appeared generally is no more or less likely to conceal assets or make fraudulent conveyances than is a local defendant. In these cir-

cumstances the only discernible state interest is an intentional discrimination against foreign defendants. Such a discrimination is difficult to justify under the commerce clause and the fourteenth amendment." App. A6, 7.

The four judges below were thus in agreement that, but for *Ownbey* and *McKay*, foreign attachment cannot constitutionally be justified on the need to obtain *in personam* jurisdiction where the court clearly has such jurisdiction over the defendant. This conclusion is strongly supported by the principles expressed in this Court's *Sniadach* opinion. In deciding that there was no extraordinary situation to justify the seizure, Mr. Justice Douglas, speaking for the Court, pointed out that the defendant was a resident of Wisconsin and that personal jurisdiction there, as in this case, was readily obtainable. 395 U. S. at 339. In this Court's subsequent decisions defining "extraordinary" and "emergency" situations, *Ownbey v. Morgan* has not been cited as authority: *Bell v. Burson*, 402 U. S. 535, 542, n. 5 (1971); *Boddie v. Connecticut*, 401 U. S. 371, 379, n. 6 (1971); *Goldberg v. Kelly*, 397 U. S. 254, 263, n. 10 (1970).[6]

In view of the uncertainty in the lower courts over the application of *Sniadach* to non-residents, it is important for this Court to make explicit its indication in *Sniadach* that

6. Mr. Justice Brennan, for this Court in *Goldberg v. Kelly*, 397 U. S. 254, 263 n.10 (1970) has suggested that "harm to the public" must be threatened in order to justify a seizure of property absent notice and hearing, for example, *Ewing v. Mytinger & Casselberry, Inc.*, 339 U. S. 594 (1950) (seizure of mislabeled vitamin products); *North American Cold Storage Co. v. Chicago*, 211 U. S. 306 (1908) (seizure of food not fit for human use). The Court of Appeals, justifying a seizure of property merely to secure jurisdiction in a private contract action thus departs from this Court's definition of "extraordinary" or "emergency" circumstance. *Goldberg v. Kelly, supra, Bell v. Burson*, 402 U. S. 535, 542 (1971).

foreign attachment is not constitutional as a jurisdictional device when *in personam* jurisdiction is readily available either under a long-arm statute or by voluntary submission to the jurisdiction of the Court.

2. Pennsylvania's Foreign Attachment Rules as a Pre-Judgment Security Device Are Unconstitutional Because They Exceed Legitimate Creditor Interests and Lack Procedural Safeguards.

Judge Becker also considered a creditor's need for pre-judgment security as a basis for Pennsylvania's Foreign Attachment Rules. After an analysis of the competing interests involved, he concluded that in view of the enormous impact of attachment upon a defendant and the absence of procedural safeguards, the Pennsylvania rules were not sufficiently narrowly drawn to protect only legitimate creditor interest. "The broad sweep of the rules encompasses within its grasp every type of claim, every type of property and every type of defendant without procedural safeguard." (App. A39.) Judge Becker found that the interest of a creditor in protection against a potentially absconding or potentially insolvent debtor could be satisfied by drawing the Foreign Attachment Rules more narrowly much in the way that the Fraudulent Debtors Attachment rules are drawn. App. A40. Under fraudulent debtors attachment, plaintiff is entitled to prejudgment attachment when the defendant with intent to defraud has or is about to remove, conceal or transfer property or has concealed himself within, absconded or absented himself from the Commonwealth. Pa. R. Civ. P. 1286. In Pennsylvania's fraudulent debtor's attachment, as distinguished from foreign attachment, defendant has an important procedural safeguard, namely plaintiff is required to post a bond in

either double the amount claimed or double the estimated value of the property to be attached. Pa. R. Civ. P. 1287.[7]

The majority of the Court of Appeals supported Judge Becker's view that the Rules were overly broad when it observed that only in "exceptional circumstances" might a plaintiff be able to demonstrate a creditor interest sufficient to justify a continuation of the attachment for security purposes after a personal appearance by the defendant. App. A6. Judge Gibbons obviously agreed with Judge Becker that the only basis for continuing a foreign attachment after defendant's appearance was the existence of the type of situation specified in the fraudulent debtor's attachment rules. For this type of problem he saw no valid reason to distinguish between foreigners and residents. "A foreign defendant who has appeared generally is no more or less likely to conceal assets or make fraudulent conveyances than is a local defendant." App. A7. Thus, all four judges below agreed that protection of creditor security is not a sufficient basis to sustain the constitutionality of the Pennsylvania Rules which are overly broad in their reach and which discriminate against foreign defendants.

B. The Decision Below Conflicts Squarely With a Decision of the California Supreme Court on an Important Issue of Federal Constitutional Law.

In their acceptance of *Ownbey* and *McKay*, as governing precedent, the District Court and the Court of Appeals in this case conflict squarely with the en banc decision of the

7. Although foreign attachment procedures differ considerably from state to state, most jurisdictions specifically limit the remedy to situations in which "the defendant is a nonresident, has absconded from the state or concealed himself therein, or is about to make a fraudulent conveyance or deplete his assets." Note, *Some Implications of Sniadach*, 70 Colum. L. Rev. 942, 946-47 (1970).

California Supreme Court in *Randone v. The Appellate Department of the Superior Court of Sacramento County*, 5 Cal. 3d 536, 96 Cal. Rept. 709, 488 P. 2d 13 (1971) *petition for cert. filed sub nom., Northern California Collection Service, Inc. v. Randone*, 40 U. S. L. W. 3375 (U. S. Jan. 11, 1972) (No. 71-898). In *Randone* the Court held the California prejudgment attachment statute unconstitutional on the basis of *Sniadach*. It found that the procedures sanctioned in *Ownbey* were constitutional only because in that day, before modern long-arm statutes, attachment provided "the only basis by which a state could afford its citizens an effective remedy for injury inflicted by nonresidents." 5 Cal. 3d at 554, 96 Cal. Rep. at 721, 488 P. 2d at 25). In effect, the California Supreme Court concluded that if the attachment procedures challenged in *Ownbey* were before this Court today, they would be held unconstitutional.

As for *McKay*, the California Court noted: (1) that "a substantial number of courts have found the vitality of *McKay* substantially impaired by the holding of *Sniadach*"; (2) that Justice Harlan in his *Sniadach* concurrence "rather explicitly indicated that *McKay* could not survive the *Sniadach* decision" when he said: "I am quite unwilling to take the unexplicated per curiam in *McKay v. McInnes* . . . as vitiating or diluting [the requirement of prior notice and hearing as] essential elements of due process" (395 U. S. at 343-344); (3) the carefully limited authority on which the *McKay* decision was based, and (4) "the **irreconcilable conflict** between the principles underlying *Sniadach* and *McKay's* purported holding".[8] [Emphasis added.]

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8. n.13, 5 Calif. 3d at 552, 96 Cal. Rep. at 719, 488 P. 2d at 23 (1971).

The California Court thus concluded that *McKay* was "too thin a reed" to support the California prejudgment attachment procedure.[9]

The conflict between the courts over the present vitality of *Ownbey* and *McKay* has thus led to confusion as to the constitutional standards applicable to state attachment statutes and to conflicting decisions on the constitutionality of such statutes. The present condition of uncertainty as to the vitality of this Court's decisions in *Ownbey* and *McKay* is an invitation to extensive interlocutory litigation in virtually every state. The conflict is the more serious—and the more appropriate for review here—because it involves interpretation of due process decisions of this Court. In cases of conflicting decisions involving Federal statutory or common law, the possibility of resolution by Congress is as available as review by this Court. Here the issue is constitutional, and will remain in confusion until this Court speaks.

C. This Court's Decisions and Opinions in *Ownbey v. Morgan* and *McKay v. McInnes* are in Conflict with the Concept of Due Process of Law Articulated in Recent Decisions of this Court which Require Notice and Hearing Before a Deprivation of Property.

The Courts below themselves saw that the thrust of this Court's recent holdings in *Bell v. Burson*;[10] *Boddie v. Connecticut*;[11] *Goldberg v. Kelly*[12] and *Sniadach v. Family*

9. Commentators have agreed with the California Supreme Court that *Ownbey* and *McKay* no longer have vitality after *Sniadach*. Comment, The Constitutional Validity of Attachment in light of *Sniadach v. Family Finance Corp.*, 17 U. C. L. A. L. Rev. 837, 844 (1970). Note, Summary Prejudgment Wage Garnishment Held Unconstitutional, 1969 Duke L. J. 1285, 1290.

10. 402 U. S. 535 (1971).

11. 401 U. S. 371 (1971).

12. 397 U. S. 254 (1970).

Corp.[13] conflict with the earlier holdings in *Ownbey v. Morgan*[14] and *McKay v. McInnes*[15] and referred to this Court the resolution of the conflict since the later decisions do not unfortunately expressly overrule *Ownbey* and *McKay*.

1. The half-century old case of *Ownbey v. Morgan* rejected due process objections to Delaware's foreign attachment procedures. By so doing this Court approved a procedure where the *total* assets of a non-resident defendant were seized without notice and a prior hearing and his appearance to defend on the merits was struck because he failed to post a $400,000 bond. Ownbey in affidavits alleged that because of the seizure he could not afford the special bail, he had valid and complete defenses to the claim, and he repeatedly petitioned the court to permit him to appear and to plead to the complaint. The Delaware Court struck Ownbey's appearance and entered a default judgment and eventually full execution was had on the attached property. A divided Supreme Court affirmed the denial to Ownbey of access to the judicial system,[16] on the outmoded ground that the due process clause is satisfied by any procedure which was part of the legal matrix prevalent in England at the time of our Revolution, 256 U. S. at 109.

This Court has long abandoned the judicial posture that measures due process in terms of what was permissible when George III was King. Mr. Justice Douglas for this Court has said:

> "The fact that procedure would pass muster under a feudal regime does not mean it gives necessary protec-

13. 395 U. S. 337 (1969).

14. 256 U. S. 94 (1921).

15. 279 U. S. 820 (1929).

16. *Contra, Boddie v. Connecticut*, 401 U. S. 371, 375 (1971).

tion to all property in its modern forms." *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340 (1969).

The legal matrix has changed since Revolutionary times, and the underpinnings of the *Ownbey* rationale have changed with it. Now process over a foreign defendant can be obtained by far reaching long-arm statutes,[17] *International Shoe Co. v. Washington*, 326 U. S. 310 (1945); see *Wenzel v. Morris Distributing Co.*, 439 Pa. 364, 266 A. 2d 662 (1970). A rule which permits a seizure without notice and a prior hearing is in conflict with this Court's recent cases which command as a minimum level of due process, notice and a hearing *before* a deprivation of property.[18]

2. This Court's unexplicated per curiam affirmance in *McKay v. McInnes*, 279 U. S. 820 (1929) of the opinion of the Maine Supreme Court in *McInnes v. McKay*, 127 Me. 110, 141 A. 699 (1928), sustained a seizure of property, by attachment, absent notice and a prior hearing. The questionable rationale of the Supreme Court of Maine had been that a deprivation of property, pending litigation, was not a cognizable deprivation under the constitution:

> [A]lthough an attachment may . . . deprive one of property, yet conditional and temporary as it is . . . we do not think it is the deprivation of property contemplated by the Constitution. *McInnes v. McKay*, 127 Me. 110, 116; 141 A. 699, 702 (1928).

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17. Pa. Stat. tit. 15, § 2011 (1968).

18. *Bell v. Burson*, 402 U. S. 535, 542 (1971); *Boddie v. Connecticut*, 401 U. S. 371, 377, 379 (1971); *Goldberg v. Kelly*, 397 U. S. 254, 264 (1970); and *Sniadach v. Family Finance Corp.*, 395 U. S. 337, 342 (1969); *Cf. Groppi v. Leslie*, — U. S. —, 40 U. S. L. W. 4149, 4151 (1972).

This Court has since soundly rejected the *McInnes* rationale by holding in *Sniadach*, 395 U. S. at 339, that the deprivation of the use of property pending litigation is a violation of the due process clause.[19]

In his concurrence in *Sniadach* at 342, Mr. Justice Harlan explained:

> The "property" of which petitioner has been deprived is the *use* of the garnished portion of her wages during the interim period between the garnishment and the culmination of the main suit.

The theory on which the older cases were decided has now been rejected by this Court and unless this Court explicitly rejects the theory and the holding of those cases, considerable confusion shall result: *compare, Randone v. Appellate Department of the Superior Court of Sacramento County, supra* and *Tucker v. Burton*, 319 F. Supp. 567 (D. D. C. 1970) and the opinion of the commentators.[20] The opinions in the instant case add confusion where the lower courts are compelled to come to a result they deem unjust and unconstitutional. Such a situation is an additional in-

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19. See *Lynch v. Household Finance Corp.*, — U. S. —, 40 U. S. L. W. 4335 (1972).

20. Carrington, *The Modern Utility of Quasi In Rem Jurisdiction*, 76 Harv. L. Rev. 303 (1962); Comment, *Expanding Limitations on Prejudgment Attachment: Reverberations of Sniadach v. Family Finance Corp.*, 12 B. C. Ind. & Com. L. Rev. 700, 709 (1971); Comment, *The Constitutional Validity of Attachment in Light of Sniadach v. Family Finance Corp.*, 17 U. C. L. A. L. Rev. 837, 844 (1970); Comment, *Some Implications of Sniadach*, 70 Colum. L. Rev. 942, 950 (1970); Comment, *Attachment in California: A New Look at an Old Writ*, 22 Stan. L. Rev. 1254, 1267 (1970); *The Supreme Court, 1968 Term*, 83 Harv. L. Rev. 113, 114 (1969); Note, 1970 Wis. L. Rev. 181, 190; Note, *Attachment and Garnishment*, 68 Mich. L. Rev. 986, 1004 (1970); Note, *Garnishment Statutes and Due Process: The Effect of Sniadach v. Family Finance Corporation*, 7 Harv. J. Legis. 231, 237 (1970); and Note, *Summary Prejudgment Wage Garnishment Held Unconstitutional*, 1969 Duke L. J. 1285, 1290.

vitation to litigants in every state of the Union to challenge foreign attachment on the important federal constitutional grounds urged here. This confusion can only be resolved by this Court.

D. Pennsylvania's Foreign Attachment Procedure Raises Important Questions Under the Fourth Amendment.

Pennsylvania's foreign attachment procedure provides for seizures [21] of property without a warrant, without supporting affidavits and without the intervention of a judicial officer. The prohibitions of the Fourth Amendment are applicable to Pennsylvania and its foreign attachment procedures: *Mapp v. Ohio*, 367 U. S. 643 (1961); *Ker v. California*, 374 U. S. 23 (1963); *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N. D. N. Y. 1970).

A seizure is "warrantless" unless probable cause is supported by oath or affidavit: *Spinelli v. United States*, 393 U. S. 410 (1969); *Aguilar v. Texas*, 378 U. S. 108 (1964). Pennsylvania's foreign attachment procedure provides for a seizure without an oath or affidavit justifying the seizure, the property seized or the amount of the property seized, App. A2.

The Amendment deems warrantless seizures *per se* unreasonable: *See v. Seattle*, 387 U. S. 541, 543 (1967); *Camara v. Municipal Court*, 387 U. S. 523, 528-529 (1967). Pennsylvania's foreign attachment procedure provides for a seizure without a warrant, App. A2.

The Amendment prohibits a seizure unless that seizure is approved by an independent judicial officer: *Coolidge v. New Hampshire*, 403 U. S. 443, 454 (1971); *Katz v. United States*, 389 U. S. 347 (1967). Pennsylvania's foreign attachment procedures provide for no independent judicial review

21. *Pennoyer v. Neff*, 95 U. S. 714, 727 (1887); *Ownbey v. Morgan*, 256 U. S. 94, 108 (1921); 10 Standard Pennsylvania Practice 41.

prior to the seizure which is initiated by plaintiff's attorney, App. A2. See *Mancusi v. DeForte,* 392 U. S. 364, 371 (1968); *Lynch v. Household Finance Corp.,* — U. S. —, 40 U. S. L. W. 4335 (1972).

The purpose of the Fourth Amendment is to make people secure in their houses and possessions. Such security against state intrusion is not protected if the state seizures are only prohibited when criminal conduct is suspected. To allow on one hand the sheriff to seize possessions in a civil case, and on the other hand to declare such seizure unconstitutional if the case is criminally related would make folly of the Fourth Amendment. The protection of the Fourth Amendment has been applied to purely civil cases. In *Laprease v. Raymours Furniture Co.,* 316 F. Supp. 716 (N. D. N. Y. 1970), Judge Port, for a three-judge court declared New York's replevin statute repugnant to the Fourth Amendment saying:

> The Fourth Amendment does not exist simply as a shield to prevent intrusions in criminal matters, but it is a basic protection available to all, in matters both civil and criminal. See *Camara v. Municipal Court,* 387 U. S. 523 (1967); *See v. Seattle,* 387 U. S. 541 (1967).

The absence of uniformed police and broken doors does not mean that Pennsylvania, at the insistence of private counsel, has not violated the Fourth Amendment as surely and as clearly as the most unjustified search in a criminal case. As Mr. Justice White stated in *Camara v. Municipal Court,* 387 U. S. 523, 530 (1967):

> "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." [Footnote omitted.]

The unreasonableness of the instant seizure, initiated by private counsel, in aid of a private law suit, is further aggravated by the absence of notice [22] and hearing and the failure to protect the defendant from harm in the event that the seizure or its maintenance was unjustified, because the procedure does not require the plaintiff to post sufficient bond or to dissolve the seizure upon the entry of a general appearance. These elements taken together with the fact that procedure is unnecessary to gain personal jurisdiction over the defendant makes Pennsylvania procedure wholly unjustified under the Fourth Amendment.

VII. CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for a Writ of Certiorari to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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Attorneys for Petitioner.

Of Counsel:
ROBERT W. MARIS,
DILWORTH, PAXSON, KALISH,
LEVY & COLEMAN.

22. *Wyman v. James*, 400 U. S. 309, 321 (1971) is distinguishable because notice was given in advance of the home visit, and as Mr. Justice Blackmun observed the child-care and welfare issues are charged with public importance.

Certificate of Service.

I hereby certify that on this 26th day of April, 1972, three copies of this Petition for a Writ of Certiorari were hand delivered to the office of Henry Stein, Esquire, Mesirov, Gelman, Jaffe and Levin, 1510 The Fidelity Building, Philadelphia, Pennsylvania 19109.

I further certify that all parties required to be served have been served.

LAWRENCE SILVER,
2600 The Fidelity Building,
Philadelphia, Pa. 19109
Attorney for the Petitioner.

APPENDIX A.

OPINION OF U. S. COURT OF APPEALS.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1439

MARVIN LEBOWITZ

v.

FORBES LEASING AND FINANCE CORPORATION (A FOREIGN CORPORATION); BENJAMIN OGUREK; ORCHID FARALES: NETWORK CINEMA CORPORATION AND JERRY ENTMAN,

FORBES LEASING AND FINANCE CORPORATION, *Appellant*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued November 30, 1971

Before SEITZ, *Chief Judge*, KALODNER and GIBBONS, *Circuit Judges*

OPINION OF THE COURT

(Filed February 24, 1972)

SEITZ, *Chief Judge.*

The plaintiff, a resident of Pennsylvania, is a former employee of defendant Forbes Leasing (Forbes).[1] Forbes

1. Other defendants are named in the complaint. However, their status is not pertinent to the disposition of this appeal.

is a Delaware corporation and has its main office in New York. At all times here relevant it also maintained an office in Pennsylvania. However, at no time did it register to do business in that state.

Plaintiff originally sued in the Pennsylvania state courts seeking damages resulting from his allegedly invalid discharge by defendant. He asserted damages amounting to $200,000, and commenced his action by a writ of foreign attachment which the sheriff executed, prior to any notice to the defendant or any hearing, by serving two Philadelphia banks having Forbes checking accounts aggregating $75,000. Forbes then removed the case to the federal district court on the basis of diversity of citizenship and entered a general appearance. The attachment continued in effect. F. R. Civ. P. 64. Forbes moved to have it quashed. However, the motion was denied by the district court and this § 1292(b) appeal followed.

Forbes contends that the attachment of its accounts violates procedural due process of law and the Fourth Amendment to the Constitution. We see no merit in the Fourth Amendment claim. Therefore, we turn immediately to the due process contention.

Pennsylvania foreign attachment procedures authorize the issuance of a writ by the prothonotary without notice to the defendant, without any hearing, without an affidavit of meritorious action, without the posting of a bond, and without intervention by a judicial officer. Indeed, the attachment may precede the filing of the complaint by as much as five days. Once the attachment becomes effective, it is not dissolved by the general appearance of the defendant. Rather, dissolution occurs only if, inter alia, the defendant posts an adequate bond or other acceptable security or the plaintiff fails to prosecute his case with due diligence. Also, provision is made that if the defendant can demonstrate that the amount of property attached is excessive

when compared to the amount in controversy he may obtain a reduction.

Specifically, Forbes contends that the Supreme Court's recent expression concerning due process expounded in Sniadach v. Family Finance Corp., 395 U. S. 337 (1969), renders the Pennsylvania foreign attachment procedures unconstitutional. In Sniadach the Court held that Wisconsin's prejudgment wage garnishment law contravened the due process clause of the Constitution to the extent that it permitted prejudgment garnishment of a small debtor's wages without notice or a hearing. Noting the difference in factual settings between Sniadach and this appeal the preliminary inquiry therefore, is whether the due process principles expounded in Sniadach and its apparent progeny[2] render the Pennsylvania's foreign attachment procedures unconstitutional.

In Boddie v. Connecticut, 401 U. S. 371 (1971), Justice Harlan noted that due process principles are the guarantors of an efficient system for resolving disputes. We believe that the issue here should be examined in light of this observation. In this case both parties are private persons. Thus, our principal concern is whether the attachment procedures being challenged critically impair the resolution of disputes without serving to preserve any compensating governmental interest. The Court in Sniadach faced such a situation. There the seizure of Mrs. Sniadach's wages prior to any hearing on the merits of the plaintiff's claim tended to reverse the usual litigating postures of the parties. Ordinarily the plaintiff bears the burden of bringing suit and proving his claim. But Sniadach involved a situation where the defendant, as a result of the wage seizure, found herself deprived of her only means of support and, in effect, unable to avoid settlement and await

2. Compare Boddie v. Connecticut, 401 U. S. 371 (1971) and Bell v. Burson, 402 U. S. 535 (1971).

the opportunity to present her defense in an adversary proceeding.

Plaintiff's first contention is that Pennsylvania's foreign attachment procedures violate due process because they permit deprivation of property without notice, a hearing or an affidavit of meritorious action, and without requiring the posting of a bond or the intervention of any judicial officer. In view of plaintiff's particular circumstances, the question before us, therefore, is whether the due process clause precludes a Pennsylvania plaintiff from invoking that state's foreign attachment procedures against a foreign corporate defendant not registered to do business in the state.

The effect of a Pennsylvania attachment is to immobilize a defendant's property at the instance of a claimant who is not required to make a showing of even a colorable claim. This consequence, in and of itself, may critically impair the defendant's ability to participate effectively in judicial proceedings designed to resolve the dispute between the parties. Indeed, Forbes alleges that such is the case here in view of the fact that approximately 40% of its assets are tied up by the attachment. Given this possible consequence, we must ask whether Pennsylvania's foreign attachment procedures promote any compensating governmental interest.

It is quite apparent that notice as a pre-condition to an attachment might well defeat the primary purpose behind an attachment, i.e., to compel an appearance. Obviously, if the property could be removed before the attachment became effective there would be no compulsion to appear. The absence of any requirement of an affidavit of meritorious action is not a deficiency of constitutional proportions. Indeed, the complaint here was verified. Likewise, while the intervention of a judicial officer prior to attachment might be desirable, we do not agree that the

absence of such intervention renders process by attachment unconstitutional. Nor do we believe that the absence of a pre-attachment bond requirement, though such a requirement might be desirable, is contrary to due process requirements. None of these alleged deficiencies critically impair the efficiency of the adversary system. Thus, in our view, Sniadach does not require a general holding that the Pennsylvania foreign attachment procedures are unconstitutional.

This conclusion, however, does not dispose of Forbes' second contention that, in any event, foreign attachment is unconstitutional when an alternative method of obtaining jurisdiction is available. Plaintiff insists that foreign attachment, by providing a basis for obtaining jurisdiction over nonresidents, serves the important state policy of according resident plaintiffs access to the state forum in actions against nonresidents. Forbes does not contest the weight of this policy. Rather, it averts to the existence of a readily available alternative means of obtaining jurisdiction over nonresidents such as itself, i.e., Pennsylvania's "long-arm" statute.[3] Forbes' contention is that because long-arm jurisdiction adequately effectuates the state's purpose by providing residents with broad access to its courts in actions against nonresident defendants, the state's foreign attachment procedures are without justification.

Although the long-arm statute does replace the necessity for quasi-in-rem jurisdiction in some instances, it does not necessarily obviate the need for attachment prior to a non-resident defendant's general appearance. A plaintiff employing the long-arm statute may face extended litigation as to whether a particular defendant is as a matter of law subject to that process. Indeed, ultimately

3. Pa. Stat. Tit. 15, § 2011 (1961).

it may be determined that no jurisdiction exists. In contrast, to the extent of the nonresident's property subject to the state's jurisdiction, foreign attachment provides an immediate and certain basis on which to exercise jurisdiction over a nonresident defendant. It thereby constitutes a greater inducement for such a defendant to appear and, consequently, accomplishes one of the principal objectives underlying enactment of foreign legislation. We therefore conclude that the Pennsylvania foreign attachment procedures here challenged are not constitutionally objectionable as applied to Forbes before its general appearance.

Of course, Forbes implies that after its general appearance there no longer existed any justification for the attachment. We agree that, typically, after a party whose property has been attached enters a general appearance the compensating governmental interest which supports foreign attachment loses its vitality. See Boddie v. Connecticut, supra. Of course, exceptional circumstances might arise, where a plaintiff may demonstrate that release of the property attached would pose a reasonable possibility that any judgment thereafter obtained would go unsatisfied. But we are not free to adopt our own view as to post-appearance attachment. We say this because we think the reasoning of the Supreme Court's decisions in Ownbey v. Morgan, 256 U. S. 94 (1921) and McKay v. McInnes, 279 U. S. 820 (1929) precludes such action. Any reexamination of the continuing vitality of these cases must come from the Supreme Court.

The judgment of the district court will be affirmed.

GIBBONS, *Circuit Judge*, Concurring.

I am troubled by the result in this case even though I agree that under the governing precedents in the Su-

preme Court we must affirm. *Pennoyer v. Neff*, 95 U. S. 714, 717 (1877); *Ownbey v. Morgan*, 256 U. S. 94 (1921); *Coffin Brothers v. Bennett*, 277 U. S. 29 (1928); *McKay v. McInnes*, 279 U. S. 820 (1929). All of these decisions antedate the decision in *International Shoe Co. v. Washington*, 326 U. S. 310 (1945) which gave impetus to the adoption of modern long arm statutes. Whatever may be said in justification of permitting the states to use foreign attachment as an inducement to a foreign defendant to refrain from litigating the jurisdictional facts underlying the state's in personam jurisdiction over him, nothing can be said in justification of continuing the attachment after a foreign defendant makes a general appearance. A foreign defendant who has appeared generally is no more or less likely to conceal assets or make fraudulent conveyances than is a local defendant. In these circumstances the only discernible state interest is an intentional discrimination against foreign defendants. Such a discrimination is difficult to justify under the commerce clause and the fourteenth amendment. We are, however, bound by the precedents, and they were not overruled by *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969).

JUDGMENT OF THE U. S. COURT OF APPEALS.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 71-1439.

MARVIN LEBOWITZ

v.

FORBES LEASING AND FINANCE CORPORATION (A FOREIGN CORPORATION); BENJAMIN OGUREK; ORCHID FARALES; NETWORK CINEMA CORPORATION AND JERRY ENTMAN

FORBES LEASING AND FINANCE CORPORATION, *Appellant*

(D. C. CIVIL ACTION No. 71-369.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: SEITZ, *Chief Judge* and KALODNER and GIBBONS, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed April 15, 1971, as amended by order filed April 23, 1971, be, and the same is hereby affirmed, with costs taxed against appellant.

ATTEST: THOMAS F. QUINN,
Clerk.

February 24, 1972.

OPINION OF THE U. S. DISTRICT COURT.

UNITED STATES DISTRICT COURT
E. D. PENNSYLVANIA.

CIV. A. No. 71-369.

MARVIN LEBOWITZ,
Plaintiff,

v.

FORBES LEASING AND FINANCE CORPORATION (A FOREIGN CORP.), BENJAMIN OGUREK, ORCHID FARALES, NETWORK CINEMA CORPORATION AND JERRY ENTMAN,
Defendants.

April 15, 1971.
As Amended April 19, 1971.

OPINION AND ORDER

EDWARD R. BECKER, *District Judge*.

I. STATEMENT OF CASE.

We are here confronted with a challenge to the validity of the Pennsylvania foreign attachment procedure on post-*Sniadach* due process grounds. Sniadach v. Family Finance Corp.[1] is the landmark case holding that, absent notice and a prior hearing, the Wisconsin pre-judgment garnishment procedure in which a summons was issued at the request of a creditor's lawyer, and the lawyer, by serving a gar-

1. 395 U. S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969).

nished, set in motion machinery whereby wages were frozen in the interim before trial of the main suit without any opportunity on the part of a wage-earner to be heard or to tender any defense he might have, violated fundamental principles of due process.

Sniadach's seed has been scattered by the winds. It has spawned the downfall of:

1. the California[2] and Arizona[3] wage garnishment statutes, in addition to Wisconsin's;

2. the New York replevin statute;[4]

3. the California innkeeper's lien law;[5]

4. the Pennsylvania statutes relating to distress for rent[6] and confession of judgment;[7]

5. the Minnesota general garnishment statute;[8] and

6. the California statute relating to landlords' writs of immediate possession.[9]

In the wake of these precedents, a constitutional attack upon Pennsylvania foreign attachment, a similar prejudgment garnishment proceeding not limited to wages, was to be expected.

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2. McCallop v. Carberry, 1 Cal. 3d 903, 83 Cal. Rptr. 666, 464 P. 2d 122 (1970).

3. Termplan Inc. v. Superior Court, 105 Ariz. 270, 463 P. 2d 68 (1969).

4. Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N. D. N. Y. 1970).

5. Klim v. Jones, 315 F. Supp. 109 (N. D. Cal. 1970).

6. Santiago v. McElroy, 319 F. Supp. 284 (E. D. Pa. 1970).

7. Swarb v. Lennox, 314 F. Supp. 1091 (E. D. Pa. 1970), probable jurisdiction noted, 401 U. S. 991, 91 S. Ct. 1220, 28 L. Ed. 2d 529 (March 29, 1971).

8. Jones Press, Inc. v. Motor Travel Services, Inc., 286 Minn. 205, 176 N. W. 2d 87 (1970).

9. Mihans v. Municipal Court, 7 Cal. App. 3d 479, 87 Cal. Rptr. 17 (1970).

It comes before us on a motion of defendant Forbes Leasing and Finance Corporation ("Forbes") to quash the foreign attachments perfected by plaintiff Marvin Lebowitz ("Lebowitz") in the Court of Common Pleas of Philadelphia County prior to removal of the case to this Court on the grounds of diversity of citizenship. We refuse to quash the foreign attachments. However, because the case has been a difficult one for us, and because it is on the frontier of a rapidly developing field of law, we have set forth not only our reasons for denying the motion, but also our views as to countervailing considerations which we consider to be of substance, in considerable detail.[10]

II. The Factual Setting.

On January 27, 1971, Lebowitz commenced an action in equity against Forbes and the other defendants in the Court of Common Pleas of Philadelphia County. On February 1, 1971, Lebowitz caused a writ of foreign attachment to issue pursuant to and under color of the Pennsylvania Rules of Civil Procedure against Forbes. The attachment claimed an amount of $200,000 and was served upon the Girard Trust Bank and the First Pennsylvania Banking and Trust Company as garnishees. In accordance with the Pennsylvania Rules, the attachments were effected without notice to Forbes or a hearing. The report of the Girard Bank showed that it had custody of monies due Forbes in the amount of $71,672.61, and First Pennsylvania's report

10. While pondering the solution of the constitutional claim it became necessary to consider whether it was necessary to request the convening of a three-judge court pursuant to 28 U. S. C. § 2281, since the constitutionality of rules of procedure, statutory in origin (see Pa. Stat., tit. 12, § 2861 et seq. (1967)) of statewide applicability is involved. However, we conclude that, since the case involves a controversy between two private parties, neither of which is a state or even local officer, the three-judge court statute is not applicable. In support, see Klim v. Jones, 315 F. Supp. 109 (N. D. Cal. 1970).

showed that it had custody of monies due Forbes in the sum of $4,293.34.

On February 16, 1971, the action was removed to this Court on the ground of diversity between the parties, and the motion to quash the foreign attachments followed. Forbes is a Delaware Corporation, with principal offices in New York, not registered to do business in Pennsylvania; however, at all times relevant hereto, Forbes maintained an office in Philadelphia. Forbes filed a general appearance. Subsequent to filing the motion, Forbes filed an answer and counterclaim.

The factual background which may be gleaned from the well-pleaded facts, is essentially as follows. Lebowitz had engaged in business as a financial consultant with particular experience, reputation and contacts in the field of equipment lease financing. Defendant Network is in the business of franchising the operation of mini theaters in various parts of the country. Defendant Entman is a principal of Network. Lebowitz entered into an employment agreement with Forbes, a wholly-owned subsidiary of Network to be formed in Pennsylvania providing that he would become President of Forbes and would engage in business under that name. His principal duty was to obtain financial commitments for the benefit of Network. The salary arrangement included a bonus based upon profits, an expense account, and an option to purchase Forbes' stock. A further agreement between Lebowitz and Network provided that Lebowitz was to obtain certain funding commitments for Network, in return for which he was to receive stock options.

The gravamen of the complaint is the allegation that, after obtaining extensive financial commitments for Network, Lebowitz was circumvented by the defendants, acting in concert, who allegedly conspired to use the line of credit

obtained by Lebowitz for their own benefit, in disregard of the written agreements. The Complaint also alleges that Lebowitz was dispossessed from his offices, that his employment contract was wrongfully terminated, and that he received no compensation for the financial commitments obtained by him and converted to defendants' use. The damages claimed are considerably in excess of $150,000.00.[11]

Defendant's answer avers that Lebowitz breached his agreement by (1) failing to devote full time to his duties; (2) converting the assets and credit of Forbes to his own use; and (3) failing to deliver satisfactory financial commitments. The answer further avers that the employment contract was terminated for cause. The counterclaim asserts damages in the sum of $25,000.

On March 18, 1971, we heard extensive argument on the motion to quash and have considered the parties' excellent briefs.

III. Foreign Attachment—Its Ancient Lineage and the Metamorphosis From a Procedure to Compel Appearance to Pre-Judgment Execution.

Full understanding of the case before us requires an historical orientation. Our search into the origins of foreign attachment indicates that attachment of the property of a defendant to hold it pending the outcome of litigation over a debt allegedly due the plaintiff was unknown at early common law. It had its origin in the law merchant. Select Cases on the Law Merchant [12] describes an attachment issuing out of the merchants' court at the Fair of St. Ives in 1287. Acording to Glenn, Fraudulent Conveyances and

11. The Complaint includes a prayer for equitable relief which the parties agree is now moot.

12. 73 Selden Society 228.

Preferences,[13] attachment "floated into the common law world by means of that estuary of the law merchant which was called the custom of London." The custom was ultimately brought to the colonies and in most of them became part of the common law. In Pennsylvania, the custom was introduced by statute [14] and called foreign attachment.

The Pennsylvania cases recognize that attachment practice follows the custom of London.[15]

An excellent description of the custom of London and the early authorities describing the same is found in J. Patton, Foreign Attachment in Pennsylvania.[16] It appears therefrom that the process of attachment was originally intended merely to compel the appearance of the defendant by sufficient sureties to answer plaintiff's demand upon him. Patton refers to the writings of R. Woolsey in the Doctrine and Practice of Foreign Attachment in the Mayor's Court, London, .23 (1816), where it is said:

> "The process of attachment seems, therefore, in its origin, to have been originally intended merely to compel the appearance of the defendant by sufficient sureties to answer the plaintiff's demand upon him. It was justly considered that the merchants of a great mercantile city would have debtors resident in foreign countries with no means (unless by their property here), of rendering them amenable to our courts of justice. The process of attachment was, therefore, probably devised; and hence, in our commonlaw books, it is styled Foreign Attachment. But it may be re-

13. § 37, at 64.

14. The first statute was enacted in 1699. *See* Lobinger, Archaic Legal Procedure, 60 Pitt. Leg. J. 449 (1912).

15. *See, e.g.*, Alpers v. New Jersey Bell Tel. Co., 403 Pa. 626, 170 A. 2d 360 (1961); Fitzgerald v. Caldwell, 1 Yates 274, 279, rev'd, Add. 119 (1793).

16. 56 U. Pa. L. Rev. 137 (1908).

marked, that in the language of the city courts, all non-freemen are styled foreigners." [17]

The law of foreign attachment became crystallized in Pennsylvania in the Foreign Attachment Act of 1836.[18] This Act, together with its amendments and supplements, the Fraudulent Debtor's Attachment Act of 1869, as amended,[19] the Domestic Attachment Act of 1836,[20] and the Attachment of Vessels Act of 1836 and its supplements,[21] constitute the law of attachment in Pennsylvania. The final stage in the development of the law governing attachments in Pennsylvania took place in 1954, when the Rules of Civil Procedure took over much of the regulation of the attachments formerly governed by the statutes referred to above.[22] This was accomplished by the adoption of Rules of Civil Procedure expressly regulating the subjects of foreign attachment and fraudulent debtor's attachment.[23] At the same time, the Rules suspended, in whole or in part, many of the statutes previously regulating those subjects.[24] These rules

17. Blackstone also discussed the attachment procedure, in pertinent part, as follows:

"This is a writ not issuing out of chancery, but out of the court of common pleas, being grounded on the nonappearance of the defendant at the return of the original writ; and thereby the sheriff is commanded to attach him, by taking *gage*, that is, certain of his goods, which he shall forfeit if he doth not appear; or by making him find *safe pledges* or sureties who shall be amerced in case of his nonappearance."

3 Blackstone, Commentaries 280-81 (1765).

18. Act of June 13, 1836, Pub. L. No. 568, as amended Pa. Stat., tit. 12, §§ 2861-3081 (1967).

19. Pa. Stat., tit. 12, §§ 2711-18 (1967).

20. Pa. Stat., tit. 12, §§ 2741-2838 (1967).

21. Pa. Stat., tit. 12, §§ 3101-36 (1967).

22. *See* Alpers v. New Jersey Bell Tel. Co., 403 Pa. 626, 170 A. 2d 360 (1961).

23. Pa. R. Civ. P. 1251-79; 1285-92.

24. As to statute suspended, see Pa. R. Civ. P. 1461, 1462. As to statutes not suspended, see Pa. R. Civ. P. 1411, 1412.

have, of course, been amended from time to time by the Pennsylvania Supreme Court on recommendation of its Civil Procedural Rules Committee.

That the purpose of foreign attachment as it originally appeared in Pennsylvania was to secure the entry of appearance of the defendant only is demonstrated by the cases. *See* Linn v. Chapman,[25] Longbotham v. Longbotham,[26] and Raymond v. Leishman,[27] where Justice Mestrezat remarked:

> "Foreign attachment under our statute is the equivalent of a summons for commencement of a personal action. It is a process by which to commence a personal action and compel an appearance. The foundation for the writ is that the defendant is beyond the reach of process and his property within it. The purpose of the statute is to compel the constructive presence in court of the defendant who, by reason of his absence from its jurisdiction without a dwelling place therein, cannot be served with a summons [citations omitted]."[28]

More recently, however, foreign attachment has served the double purpose of compelling an appearance AND rendering the property within the state subject to the demands of creditors. This constitutes a metamorphosis of the foreign attachment procedure. The significance of this metamorphosis as it affects the notion of due process, insofar as due process is defined as the settled usage in England

25. 19 Pa. Dist. 282 (Butler Co. C. P. 1910).

26. 18 Pa. County Ct. 460 (Lanc. C. P. 1896).

27. 243 Pa. 64, 89 A. 791 (1914).

28. *Id.* at 69, 89 A. at 793. *See also* Konopka v. McAteer, 313 Pa. 510, 169 A. 778 (1934); Rankin v. Culver, 303 Pa. 401, 154 A. 701 (1931); David E. Kennedy, Inc. v. Schleindl, 290 Pa. 38, 137 A. 815 (1927); Falk Co. v. American Ry. Express Co., 79 Pa. Super. 99 (1922).

prior to emigration to the colonies, is discussed *infra* at p. 1351. This metamorphosis is demonstrated by the language of the Pennsylvania Superior Court in Sniderman v. Nerone,[29] where the court, speaking through Judge Keller, stated:

> "The primary purpose of a foreign attachment is to compel a foreign nonresident to appear within the jurisdiction and defend the plaintiff's claim; a secondary purpose is by attaching the foreign defendant's goods and property to secure a fund or property out of which the plaintiff's claim, when reduced to judgment, may be paid." [30] [31]

We proceed now to a brief summary of the rules under attack.

A foreign attachment may be issued to attach property of a defendant not exempt from execution.[32] Where the defendant is subject to such action, any person owing a debt to defendant, having property of the defendant in his custody, possession or control, holding fiduciary property in which the defendant has an interest, or holding legal title to property of the defendant may be made a garnishee.[33] The attachment is commenced by filing a praecipe for a writ with the prothonotary which directs the sheriff to attach such items of property of the defendant as are set forth in the praecipe and all other property of the defendant.[34] The prothonotary immediately enters the

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29. 136 Pa. Super. 381, 7 A. 2d 496, aff'd per curiam, 336 Pa. 305, 9 A. 2d 335 (1939).

30. *Id.* at 385, 7 A. 2d at 498.

31. *See also* Marano v. Granata, 151 Pa. Super. 454, 30 A. 2d 243 (1943).

32. Pa. R. Civ. P. 1252.

33. Pa. R. Civ. P. 1253.

34. Pa. R. Civ. P. 1255(a).

attachment against the defendant in the judgment index.[35] If the sheriff attaches real property, legal title to which is held by the garnishee, the prothonotary, on praecipe of the plaintiff, immediately enters the attachment against the garnishee in the judgment index.[36] The attachment extends to the property after acquired by the garnishee,[37] may reach a safe deposit box,[38] or real property, including liens and rents,[39] and, in fact, to any form of property not exempt from execution.[40] The rules authorize manual seizure by the sheriff.[41] No bond or security is required of the plaintiff commencing the foreign attachment by the sheriff except for the actual or estimated cost of obtaining possession of the property.[42] Plaintiff is required to file a complaint setting forth his cause of action but not until five days after the filing of the foreign attachment proceedings.[43] The attachment is implemented by the filing of a garnishee's report, setting forth in detail the property of the defendant in his possession.[44]

Foreign attachment is generally considered under both the statutes and the rules as a form of process and not a form of action.[45] As the Goodrich-Amram commentary points out, foreign attachment, until the defendant is served with the complaint, appears or files a bond or security, has many characteristics of a proceeding *in rem;* however,

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35. Pa. R. Civ. P. 1255(b).
36. Pa. R. Civ. P. 1255(c).
37. Pa. R. Civ. P. 1258(a).
38. Pa. R. Civ. P. 1259.
39. Pa. R. Civ. P. 1260.
40. Pa. R. Civ. P. 1252.
41. Pa. R. Civ. P. 1261.
42. Pa. R. Civ. P. 1262.
43. Pa. R. Civ. P. 1265(a).
44. Pa. R. Civ. P. 1266(a).
45. *See* Goodrich-Amram, Pa. Proc. R. Serv. § 1251-5, at 15 (1962).

unlike a proceeding purely *in rem*, the attachment affects merely the interest of the defendant in the property attached, and no personal judgment may be rendered against the defendant unless he becomes subject to the jurisdiction of the court *in personam* by service of process upon him or by a voluntary action, such as an appearance or the filing of a bond.[46]

Against that background, Rule 1272 provides for dissolution of attachment only upon:

(1) the entry of bond or security;

(2) the failure of the plaintiff after judgment against the defendant to proceed diligently against the garnishee;

(3) the failure of the plaintiff, after the garnishee has answered interrogatories, to proceed diligently against the garnishee; or

(4) the failure of the plaintiff generally to prosecute the action with due diligence.

Rule 1273 provides that:

"The court on the petition of any person or party, may, at any time after notice and hearing

(1) review the action of the prothonotary in approving or rejecting the bond or security offered;

(2) increase or decrease the amount of any bond or security;

(3) strike off a bond improperly filed; or.

(4) permit the substitution of a bond or security and enter exoneration of a prior bond."

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46. *Cf.* Ownbey v. Morgan, 256 U. S. 94, 41 S. Ct. 433, 65 L. Ed. 837 (1921), describing a different procedure in Delaware.

We set these provisions forth in *haec verba* because they represent the first time in the procedure where the defendant may appear and be heard. Until then, everything is done on a purely ministerial basis by the prothonotary and sheriff without notice or hearing. And the scope of the hearing in this instance is limited principally to a determination of the propriety of the *amount* of security.

We have described the foreign attachment history and procedure. We come now to a construction of *Sniadach*.

IV. Sniadach—Can Its Due Process Import Be Limited to Wage Garnishment-type Cases?

The Wisconsin statute struck down by *Sniadach* permitted a creditor to institute legal action by garnishing wages. Under the statute, the clerk of court issues the summons at the request of the creditor's lawyer; the garnishment prior to any hearing follows. In holding that the pre-judgment garnishment procedure violated the fundamental procedures of due process of law, and that no situation requiring special protection to a state or creditor interest was presented by the facts (Mrs. Sniadach was readily amenable to *in personam* jurisdiction), the Supreme Court came down heavily on the fact that:

> "We deal here with wages—*a specialized type of property presenting distinct problems in our economic system.*" [47]

The Court, speaking through Mr. Justice Douglas, discussed at length the hardship which the Wisconsin-type statute imposes on wage earners with families to support, and it referred to the statements by Congressmen who have investigated these matters. Congressman Reuss was cited as referring to the idea of garnishment in advance of judg-

47. 395 U. S. at 340, 89 S. Ct. at 1822 (emphasis added).

ment as "a most inhuman doctrine". Congressman Sullivan, Chairman of the House Subcommittee on Consumer Affairs, was quoted as stating that:

> "What we know from our study of this problem is that in a vast number of cases the debt is a fraudulent one, saddled on a poor ignorant person who is trapped in an easy credit nightmare, in which he is charged double for something he could not pay for even if the proper price was called for, and then hounded into giving up his pound of flesh, and being fired besides." 114 Cong. Rec. 1832.[48]

After referring to the "enormous" leverage of the creditor on the wage earner, Justice Douglas concluded:

> "The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall. Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing (cf. Coe v. Armour Fertilizer Works, 237 U. S. 413, 423, 35 S. Ct. 625, 628, 59 L. Ed. 1027) this prejudgment garnishment procedure violates the fundamental principles of due process."[49]

In view of the foregoing language, one's first reaction is to consider *Sniadach* as turning on the "specialized type of property" concept; as being a special application of procedural due process to persons in the marginal or submarginal socio-economic class. This construction can be

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48. *Id.* at 341, 89 S. Ct. at 1823.

49. *Id.* at 341-342, 89 S. Ct. at 1822-1823 (footnote omitted).

borne out by an analysis of some of the leading cases which followed in *Sniadach's* wake.

We turn first to Goldberg v. Kelly.[50] The plaintiff was a New York City resident receiving financial aid under the federally assisted A. F. D. C. program, whose benefits were terminated or were about to be terminated in accordance with the New York procedure without notice or hearing. The Supreme Court held that, under all of the circumstances, due process required an evidentiary hearing before termination of welfare benefits, and that the fact that there is later on a constitutionally fair procedure does not change the result. The Court at one point remarks that "by hypothesis" the welfare recipient is destitute, and that it would be unconscionable to cut off benefits without a prior hearing in the absence of overwhelming considerations to justify it. The court regarded as the "crucial factor" in this context that the termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means to live while he waits. *Sniadach* is relied upon in the court's opinion.

Santiago v. McElroy,[51] emanated from a three-judge court which had before it an attack upon the constitutionality of the distraint procedures of the Pennsylvania Landlord and Tenant Act of 1951, Pa. Stat., tit. 68, § 250.302-313 (1965), authorizing the levy and sale of tenant's goods. The remedy of distress was age-old. As encrusted in the Act, it provided that whenever the landlord concluded that rent was due and owing, either he or his agent was authorized to distrain all property on tenant's premises not statutorily exempt from the levy and to have the goods appraised and then sold at public sale if no replevin action was instituted by the tenant within a five-day period. Judge Joseph S.

50. 397 U. S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970).
51. 319 F. Supp. 284 (E. D. Pa. 1970).

Lord, III, speaking for the court found the case to be "indistinguishable" from *Sniadach*. He rejected the notion that distress sales qualified as a time-honored procedure and, after examining the record, found no sufficient evidence of an "extraordinary situation * * * requiring *special* protection to a state or creditor interest". He further found that the statute was not narrowly drawn to meet the unusual condition. The Santiagos, consisting of husband, wife and eight children, were public assistance recipients with no savings.

Swarb v. Lennox[52] was an attack upon the constitutionality of acts of the Pennsylvania General Assembly pertaining to confession of judgment. The procedure permits a debtor to sign an agreement containing a clause authorizing the prothonotary, court clerk or any attorney to appear in any court at any time to confess judgment against the debtor for any unpaid portion of the debt along with various fees and charges. The court recited the exceedingly cumbersome procedure requiring retention of counsel and considerable expense required to open a judgment. The court also considered testimony establishing that: (1) 95% of the judgment notes placed on record in Philadelphia were signed by individuals who did not understand what they were signing; and (2) 96% of confessed judgments in Philadelphia for a given period were against individuals earning less than $10,000 per year. The court relied expressly upon *Sniadach* in holding that the procedure violated the due process requirements of notice and an opportunity to be heard prior to the entry of judgment as to persons earning less than $10,000 per year. One judge of the three-judge court, District Judge Charles

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52. 314 F. Supp. 1091 (E. D. Pa. 1970), probable jurisdiction noted, 401 U. S. 991, 91 S. Ct. 1220, 28 L. Ed. 2d 529 (Filed March 29, 1971).

Weiner, dissented in part and would apply the Court's ruling to all individuals regardless of income.[52a]

In Laprease v. Raymours Furniture Co.,[53] a three-judge court, relying upon *Sniadach*, invalidated the New York Rules governing procedure in a replevin action which permitted the pre-hearing seizure of the subject matter of the action without the intervention or order of a judicial officer. The three plaintiffs were either welfare recipients or marginal wage-earners whose household furnishings were repossessed by the vendor for alleged failure to make time payments. The court analogized to *Sniadach*:

> "Beds, stoves, mattresses, dishes, tables and other necessaries for ordinary day-to-day living are, like wages in *Sniadach*, a 'specialized type of property presenting distinct problems in our economic system' * * *."

It added:

> "The factual difference that *Sniadach* dealt with an unsecured interest and in these cases the vendors' interests were secured, dissolves before the purchasers' claims that there were no defaults and no right to repossession * * *."[53a]

52a. On April 5, 1971, Mr. Justice Brennan issued a temporary stay order of all sales of property: (1) based on confessions of judgment in documents signed by families earning $10,000 or more; and (2) based on confessions of judgment in mortgage documents.

53. 315 F. Supp. 716 (N. D. N. Y. 1970).

53a. *Id.* at 723. *Cf.* Epps v. Cortese, 326 F. Supp. 127 (E. D. Pa., filed March 31, 1971), reaching an opposite result on the constitutionality of a replevin statute. The *Epps* court achieved a different conclusion from *Sniadach*, in part because of the identifiable nature of the property and the existence of the security interest. We note at this point that the case at bar involves an unliquidated claim for tortious conspiracy in which the property attached is not identifiable to the claim—a very different situation from *Epps* and *Laprease*.

The applicability of Goldberg v. Kelly and Swarb v. Lennox are limited by their holdings to deprived classes or at least to persons of moderate means. We know that Mrs. Sniadach's wages were not substantial although there is no indication of what her financial situation was otherwise. *Santiago* and *Laprease* deal on their face with persons of marginal incomes, from public assistance or otherwise. But, as this Court analyzes them, it is difficult to bottom them conceptually on the *Sniadachian* "specialized type of property" concept. And there is no language in either opinion which compels a different result if the persons whose goods are distrained upon or furnishings replevied were affluent. In terms of the due process analysis, why should a different result have been obtained had the plaintiff in *Santiago* been the affluent tenant of a center-city luxury high rise who was temporarily financially distressed, or inadvertently late in payments, or was withholding rent payment because of a genuine dispute as to liability. Would the detention and sale of his household goods under the statutory procedure struck down have been any less offensive? In *Laprease*, would the replevin procedure been more palatable had the defendant whose goods were replevied been a corporation?

With this introduction, we raise the difficult question as to whether *Sniadach* must be interpreted narrowly as a case bottomed upon the "specialized type of property" involved, to wit, wages, or whether it should be given a broader interpretation as a due process case across the board, regardless of the type of property involved or the affluence of the debtor. We are not the first court which has been confronted with the question.

The closest case on point is Black Watch Farms v. Dick,[54] which involved an attack upon the Connecticut gen-

54. 323 F. Supp. 100 (D. Conn. 1971).

eral attachment law—a broader enactment even than the Pennsylvania foreign attachment rules, for it permitted attachment without notice or hearing prior to suit against even a Connecticut resident. In upholding the law, Judge Zampano construed *Sniadach* narrowly, limiting its effect to wages.

In a decision filed but days ago, Epps v. Cortese, 326 F. Supp. 127 (E. D. Pa., filed March 31, 1971), a three-judge district court rendered an equally narrow holding of *Sniadach* in refusing to invalidate the Pennsylvania Replevin With Bond Rules which permit the seizure of identifiable property without notice or hearing where a creditor claims reservation of title and default under a conditional sales agreement. The court distinguishes *Laprease* on several grounds but indicates that, if it were not distinguishable, it would nonetheless differ with its holding. There are a number of other cases adopting a strict interpretation of *Sniadach*.[55] However, there is im-

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55. Brunswick Corp. v. J & P, Inc., 424 F. 2d 100 (10th Cir. 1970); Fuentes v. Faircloth, 317 F. Supp. 954 (S. D. Fla. 1970), probable jurisdiction noted, 401 U. S. 906, 91 S. Ct. 893, 27 L. Ed. 2d 804 (Feb. 22, 1971); American Olean Tile Co. v. Zimmerman, 317 F. Supp. 150 (D. Hawaii 1970); Young V. Ridley, 309 F. Supp. 1308 (D. D. C. 1970); Termplan Inc. v. Superior Court, 105 Ariz. 270, 463 P. 2d 68 (1969); Andrew Brown Co. v. Painters Warehouse, Inc., 11 Ariz. App. 571, 466 P. 2d 790 (1970); Johnston v. Cunningham, 12 Cal. App. 3d 123, 90 Cal. Rptr. 487 (1970); Western Bd. of Adjusters, Inc. v. Covina Publishing Co., 9 Cal. App. 3d 659, 88 Cal. Rptr. 293 (1970); Michael's Jewelers v. Handy, 6 Conn. Cir. 103, 266 A. 2d 904 (1969); Robinson v. Loyola Foundation, Inc., 236 So. 2d 154 (Fla. Ct. App. 1970); 300 West 154th St. Realty Co. v. Department of Bldgs., 26 N. Y. 2d 538, 311 N. Y. S. 2d 899, 260 N. E. 2d 534 (1970).

The Supreme Court has not spoken to this area of the law since *Sniadach*. The closest case is Boddie v. Connecticut, 401 U. S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (filed March 2, 1971), holding that the due process clause of the fourteenth amendment bars a state from denying indigents access to the divorce court solely because of their inability to pay costs and fees, where the Court stated:

pressive authority opting for a broader view of *Sniadach* as well.

In this regard, we consider first the case of Klim v. Jones, 315 F. Supp. 109 (N. D. Cal. 1970). *Klim* was an action by a boarder against the proprietor and manager of a hotel asserting the unconstitutionality of the California innkeepers lien law. Like other remedies we have been discussing, the innkeepers lien is an ancient remedy. It dates from Roman Law and coursed from there into the common law. Under the innkeepers lien law, all of a boarder's personal property may become subject to the innkeepers lien prior to any hearing in the matter. Judge Levin held the law to be unconstitutionally infirm on *Sniadach* due process grounds for its failure to provide for any sort of hearing prior to the imposition of the innkeepers lien thereunder. It happened that Klim was irregularly employed as a painter, was of limited financial means, and was receiving cash aid from the Department of Social Services of San Francisco on an emergency basis at the time the action was filed. His weekly rental was $10. The action arose when, despite Klim's protestations that no rent was due and owing, he was locked out of his room with his personal belongings still inside. While Judge Levin indicated that the primary impact of the innkeepers lien law appeared to be upon those who were of limited means, he also observed as follows:

> "Although recent court opinions have left in doubt whether *Sniadach* was based strictly on due process

55. (Cont'd.)

"That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for *extraordinary situations* where some valid governmental interest is at stake that justifies postponing the hearing until after the event." (91 S. Ct. at 786) [emphasis added].

grounds or whether it was more concerned with the particular type of property discussed there, this court regards *Sniadach* as standing inescapably on constitutional principles."[56]

For the fact is that the innkeepers lien law affects rich as well as poor. Judge Levin also pointed out that while wage garnishment, as in *Sniadach*, applies only to wages and only to a portion thereof, leaving the debtor's other property unencumbered, under the innkeeper's lien law *all* of the boarder's possessions may be denied him if he keeps them in his lodgings.

A more trenchant statement of this view is found in Larson v. Fetherston, 44 Wis. 2d 712, 172 N. W. 2d 20 (1969). In this case, the Wisconsin Supreme Court, which had been reversed in *Sniadach*, was called upon to consider the applicability of the *Sniadach* decision invalidating the Wisconsin pre-judgment garnishment statute to a case involving a dispute between parties to a substantial commercial transaction. The sums garnished totalled over $31,000. The respondents sought to avoid dismissal of their garnishment actions by arguing that the *Sniadach* decision was limited in scope, and should be applied only to garnishment of wages. Speaking through Mr. Justice Hanley, a unanimous Wisconsin Supreme Court held:

"Although the majority opinion in *Sniadach* makes considerable reference to the hardship of the unconstitutional procedure upon the wage earner, we think that no valid distinction can be made between garnishment of wages and that of other property. Clearly, a due process violation should not depend upon the type of property being subjected to the procedure.[57]

56. 315 F. Supp. at 122 (footnote omitted).

57. 44 Wis. 2d at 718, 172 N. W. 2d at 23. In Gerovac v. Hribar Trucking, Inc., 43 Wis. 2d 328, 168 N. W. 2d 863 (1969),

Jones Press Inc. v. Motor Travel Services, Inc.[58] is a unanimous decision of the Minnesota Supreme Court invalidating a general garnishment statute where the case at bar involved garnishment of accounts receivable. The court stated:

> "We have great difficulty in distinguishing between the impounding of wages without notice and an opportunity to be heard and garnishing accounts receivable under similar conditions. The hardship and injustice stressed in the majority opinion in Sniadach are equally applicable to the laborer, artisan, or merchant, whose livelihood depends on selling customers his services or his goods. It seems to us that the fortuity of a debtor's being self-employed should not insulate a creditor from according the debtor procedural due process. * * * *No rational distinction can be drawn between a livelihood dependent on wages and one derived from the sale of services and goods if the rationale of the Sniadach case is based on the policy of protecting a breadwinner from the harassment of creditors. If, as we have indicated, that decision is premised on the broader constitutional concept of notice and an opportunity to be heard, the rule should apply to the garnishment of all property.*" [emphasis added].[59]

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57. (Cont'd.)
the Wisconsin Supreme Court spoke again on the subject. Justice Hansen pointed to the concurring opinion of Mr. Justice Harlan in the *Sniadach* case:

> "The writer, for himself only, concludes that the garnishment action here involved might survive the majority decision, but would be torpedoed by the logic of the concurring opinion." *Id.* at 334 n. 5, 168 N. W. 2d at 866 n. 5.

58. 286 Minn. 205, 176 N. W. 2d 87 (1970).

59. *Id.* at —, 176 N. W. 2d at 90-91. *See also* Mihans v. Municipal Court, 7 Cal. App. 3d 479, 87 Cal. Rptr. 17 (1970), in-

Against this background, one restates the question as follows: Is procedural due process divisible? May it be the subject of a dual standard, dependent upon the financial circumstances of the party whose property is seized without notice or hearing?[60]

The question is heightened by the observation that *Sniadach* was decided on due process, not on equal protection,[61] grounds.

Proponents of the narrower construction of *Sniadach* might well say that this is an unfair question. For one essence of the *Sniadach* holding is that, while a procedure may be fair (and fairness is the essence of due process) as to a defendant who has the means to combat it or to "roll with the punches", it may not be when the seizure of one's property deals a staggering or knockout blow. One cannot quarrel with this reasoning as far as it goes. The problem with it is that the impact of seizure of property without notice or hearing may be as great or greater upon a defendant not in the wage-earning or marginal socio economic class.

In the instant case, without notice or hearing, $75,000 in cash was tied up in one fell swoop. Counsel for Forbes represents that this sum represents 40% of its assets. The question is heightened by the observation that *Sniadach* was decided on due process, not on equal protection,[61]

59. (Cont'd.)
validating a California statute permitting the issuance of a prejudgment writ of immediate possession by a landlord pending hearing on the merits, on *Sniadachian* grounds.

60. *Cf.* Weiner, J., dissenting in part in Swarb v. Lennox, *supra*, and the stay order of Mr. Justice Brennan pending appeal (see note 52a, *supra*) on the question of whether the validity of confession of judgment in Pennsylvania depends upon the income of the debtor. In this regard we note that the *Swarb* majority's refusal to extend its holding to persons or families with incomes of more than $10,000 a year was based upon evidentiary, not constitutional, principles.

61. One case in the line discussed by this opinion also went off on equal protection grounds. Mihans v. Municipal Court, 7 Cal. App. 3d 479, 87 Cal. Rptr. 17 (1970).

Forbes is in the financing business; counsel asserts that, pending dissolution of the attachment, its business is measurably paralyzed. In construing the validity of the Delaware foreign attachment statute in Ownbey v. Morgan,[62] the Supreme Court said:

> "this [the reasonableness of the requirement and its consistency with the established modes of administering justice] must be determined not alone with reference to a case of peculiar hardship arising out of exceptional circumstances, but with respect to the general effect and operation of the system of procedure established by the statutes."[63]

In many a case, the attaching creditor could be either exceptionally astute or exceptionally lucky and manage to attach all of a debtor's assets. Even an affluent debtor would be gravely disadvantaged under these circumstances.

An affluent debtor can, of course, obtain counsel to contest the proceedings. However, under the foreign attachment law, there are only two meaningful ways to dissolve the attachment: (1) by posting security; and (2) by winning the suit.

With respect to the former, it is true that Forbes could post a bond. It has asserted that the cost would be substantial but concedes it to be affordable. The problem is that posting a bond involves more than paying a premium. The Court takes judicial notice of the fact that surety companies, more often than not, require security for the posting of a bond, which may take the form of cash or other property. The existence of the bond obligation would have to appear on the accounting records of the corporation and, in many cases, would impair its credit standing. Moreover, the Pennsylvania Foreign Attach-

62. 256 U. S. 94, 41 S. Ct. 433, 65 L. Ed. 827 (1921).
63. *Id.* at 103-104, 41 S. Ct. at 435.

ment Law is not limited to attaching the property of corporations. While concededly it has its greatest applicability in the field of nonconsumer commercial transactions, nonetheless, the range of potential defendants within its orbit runs the societal gamut. Any debtor might be the subject of a foreign attachment action and have the bulk of his assets tied up without notice or hearing.

It is true that the debtor may have the attachment dissolved by being successful in the law suit. Suffice it to say that in a contemporary metropolitan area, the court backlog may prevent this method of dissolution for several years. In this regard, it should be noted that any doubts that *temporary* deprivation of property can constitute a denial of due process have been laid to rest by *Sniadach*.

One searches in vain for a satisfactory definition of procedural due process. For example:

> "In its procedural aspect, the constitutional guaranty of due process of law assures to every person his day in court and the benefit of the general law, and means that there can be no proceeding against life, liberty, or property without observance of those general rules established in our system of jurisprudence for the security of private rights."[64]

Essentially, due process involves a balancing procedure, pursuant to which the Court must consider:

> "the precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed * * *, the balance of hurt complained of and good accomplished."[65]

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64. 16A C. J. S. Constitutional Law § 569(4)a (1956). *See* Truax v. Corrigan, 257 U. S. 312, 332, 42 S. Ct. 124, 66 L. Ed. 254 (1921).

65. Joint Anti-Fascist Committee v. McGrath, 341 U. S. 123, 163, 71 S. Ct. 624, 644, 95 L. Ed. 817 (1951) (Frankfurter, J., concurring).

In the case of Goldberg v. Kelly, *supra*, for instance, the Supreme Court held that the extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss, and depends on whether the recipient's interest in avoiding the loss outweighs the governmental interest in summary adjudication.[66] The notion that fundamental fairness must be accorded the litigants and that the determination of what is fundamentally fair inevitably involves a weighing and balancing of their respective interests permeates the procedural due process cases, including *Sniadach*, where it took the form of the Court's inquiry as to whether a special state or creditor interest outweighs the detriment to the debtor. In the next section of this opinion, we shall discuss the creditor's side of the coin—and whether, in *Sniadachian* language, a special state or creditor interest requiring protection is presented by the facts.

In this section of our opinion, our discussion has been directed to the impact upon the debtor. As Judge Levin observed in *Klim*, under the Wisconsin statute only a portion of the debtor's wages are garnished. However, under the innkeepers lien law all of the debtor's possessions may be attached. And, under the Pennsylvania Foreign Attachment Law, if the creditor is lucky enough or astute enough, he too may attach virtually all of the alleged debtor's property.

We have discussed this possibility apropos of the situation of Forbes. We made no finding that 40% of Forbes' assets have been tied up, having heard no actual testimony on that point, only the representations of counsel. However, assuming that these representations are even ap-

66. *See also* Cafeteria and Restaurant Workers Union, Local 473 v. McElroy, 367 U. S. 886, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961).

proximately accurate, can it be gainsaid that Forbes Leasing Corporation is proportionately any better off than Mrs. Sniadach? In fact, it may be far worse off.

In view of all the foregoing analyses, we express grave doubt as to whether *Sniadach* may be read only as a poor debtor or consumer case, as opposed to a due process case across the board. Full resolution of the question thus posed depends upon whether there is a sufficient state or creditor interest to justify the foreign attachment rules and whether they are sufficiently narrowly drawn to satisfy such interest.

V. Is There a Sufficient State or Creditor Interest to Justify the Foriegn Attachment Rules? Are the Rules Narrowly Enough Drawn?

We have adverted on several occasions to the holding in *Sniadach* that a prejudgment garnishment-type statute may be constitutionally maintained if there is an "extraordinary situation * * * requiring special protection to a state or creditor interest" and, "the statute [is] narrowly drawn to meet the unusual condition." [67]

This Court agrees with Lebowitz that the state has a valid interest in protecting its residents so that they may assert claims against non-residents doing business within the state's borders without having to travel elsewhere. The

67. The Court does not define "state interest" in this context. However, from the cases it cites in juxtaposition to the phrase, it would seem that a state interest would be such as that involved in Ewing v. Mytinger & Casselberry, Inc., 339 U. S. 594, 70 S. Ct. 870, 94 L. Ed. 1088 (1950), sustaining pre-hearing seizure of misbranded articles prior to a hearing when the Administrator had probable cause to believe the articles to be dangerous to health; and Fahey v. Mallonee, 332 U. S. 245, 67 S. Ct. 1552, 91 L. Ed. 2030 (1947); and Coffin Bros. & Co. v. Bennett, 277 U. S. 29, 48 S. Ct. 422, 72 L. Ed. 768 (1928), involving prehearing actions in connection with the management of banks. The state could, of course, also have an interest in protecting a creditor's legal rights.

first area of concern is the amenability of the defendant to personal service. However, where a defendant, though a non-registered corporation or a non-resident individual, is doing business in Pennsylvania, he or it is subject to the Long-Arm Statutes,[68] and therefore to personal service.

Pa. Stat., tit. 15, § 2011 (1961) is a provision of the Pennsylvania Business Corporation Law allowing for service of process against a foreign business corporation doing business in Pennsylvania by serving the Secretary of the Commonwealth who, in turn, serves the corporation by mailing the legal process to its registered office.[69] The Act of July 1, 1970, Act No. 152, constitutes a broadening of this so-called Long-Arm Statute and makes it applicable to non-resident individuals as well as corporations and to causes of action arising outside Pennsylvania, as well as those arising therein.

It is undisputed that the defendant corporation had an office and a telephone in Philadelphia. The face of the complaint reveals that very substantial business, including the obtaining of a line of credit in excess of a quarter of a million dollars, was being conducted here. There can be no question but that Forbes was doing business in Pennsylvania and was amenable to the reach of the Long-Arm Statute and that the plaintiff need not travel to another forum to sue. Forbes has entered a general appearance through counsel.

Having concluded that there is a valid state or creditor interest which inheres in the rules, i.e., the protection of the right of a creditor of a party doing business in Pennsylvania to sue him in Pennsylvania if he can find and attach debtor's property in Pennsylvania, without having to travel

68. Pa. Stat., tit. 15, § 2011 (1961); Pa. Stat., tit. 12, § 342, 1970 Pa. Legis. Serv. 320 (Act No. 152, July 1, 1970).

69. *See* Wenzel v. Morris Distributing Co., 439 Pa. 364, 266 A. 2d 662 (1970).

to another forum, it would nonetheless appear in the language of *Sniadach*, that insofar as *this* state policy is concerned, the rules are not sufficiently narrowly drawn, for they do not exclude from their orbit situations where, as here, the defendant is within the reach of the Long-Arm Statute.

Justification of state policy in this situation must, therefore, rest upon the second purpose of the foreign attachment rules, which we have referred to: the securing of execution in advance of judgment by freezing property subject to the attachment until the conclusion of the suit and rendering it available for satisfaction of the judgment obtained.

Is this a valid state policy in terms of protection of creditors? Certainly, there is an enormous creditor interest in this policy. Equally certain, there are many, many cases where the protection of this interest is bona fide. There are countless debtors who will remove property from sight and from the State or dissipate it in order to avoid execution. Under such circumstances, state policy in protecting creditors by means of foreign attachment is valid. The question then becomes as to whether: (1) the rules are sufficiently narrowly drawn to protect this interest; and (2) the creditor interest is not attenuated by auxiliary remedies available to a creditor or (3) far outweighed by the countervailing interests of the debtor.

If the would-be foreign attachment creditor were relegated to the status of an ordinary creditor, he would be required to sue, obtain his judgment, and then discover a fund upon which to execute. If he were able to uncover the fund in Pennsylvania, he could execute on it in Pennsylvania. In the present case, incidentally, plaintiff direly predicts that Forbes will remove its assets from Pennsylvania, but that is speculation. It may, and yet it may not.

If assets in Pennsylvania are unavailable, the plaintiff can resort either to the Uniform Enforcement of Judgments Act [70] or to suing on the judgment in the sister state. The latter is a commonplace proceeding and is not necessarily difficult. As long as the full faith and credit clause remains, the practice of suing on judgments in a sister state will be a common device in aid of execution. In the year 1971, where communication is instant and transportation is high-speed, the boundaries between states are traversed in financial and legal transactions millions of times daily with facility and dispatch. But, to be sure, it is cumbersome and annoying to have to seek execution in a sister state.

On the other hand, consider the damage to the debtor. Notwithstanding the existence of what may be a meritorious defense, he is subject to having his property tied up instantly and for years. He is remediless unless he posts a bond, in connection with which he may not only be required to advance a substantial premium, but also to post security and impair his credit. The leverage is instant. He is entitled to a reduction of the garnished sum or of security only if he can show that the possible judgment is less than

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70. There are two such acts. The 1948 Act was adopted by the following states:

Ark.—1949—Ark. Stat. §§ 29-801—29-818
Ill.—1951—S. H. A., ch. 77, §§ 88-105
Mo.—1951—V. A. M. S. § 511.760
Neb.—1949—R. R. S. §§ 25-1587—25-15, 104
Oregon—1955—Ore. Rev. Stat. 24.010-24.180
Wash.—1953—R. C. W. A. 6.36.010-6.36.910
Wis.—1949—Wis. Stat. § 270.96
Wyo.—1949—Wyo. Stat. §§ 1-460—1-477.

The 1964 revision, which adopts the federal practice and provides a more speedy and economical method of enforcing foreign judgments, has been adopted by:

Pa.—1965—Pa. Stat., tit. 12, §§ 921-928
Wis.—1965—Wis. Stat. § 270.96
Col.—1969—Col. Rev. Stat. §§ 77-13-1—77-13-8
N. Y.—1970—C. P. L. R. §§ 5401-08.

the amount attached. All the plaintiff need show is a colorable claim. He is not even required to post a bond to protect the defendant. In view of the enormous detrimental impact which such prenotice and hearing seizure, not even curable by notice and hearing, may have on the business of a debtor, it could be concluded that the interest of the debtor in being free from this type of seizure outweighs the state or creditor interest in protecting the plaintiff, or at least that the rules are not sufficiently narrowly drawn to protect the valid creditor interest alone. The broad sweep of the rules encompasses within its grasp virtually every type of claim, every type of property, and every type of defendant without procedural safeguard. *Cf.* Laprease v. Raymours, *supra,* where the court stated, at p. 723:

> "The statute, giving the right to repossess without a hearing, is not 'narrowly drawn' to meet special situations and circumstances but covers any replevin situation."

One situation to which the applicability of the rules could not be assailed is that contemplated by the Pennsylvania Fraudulent Debtors Attachment, Pa. R. Civ. P. 1286, which provides for pre-judgment attachment when it is alleged that defendant, with intent to defraud the plaintiff:

> "(1) has removed or is about to remove property from the jurisdiction of the court;
>
> (2) has concealed or is about to conceal property;
>
> (3) has transferred or is about to transfer property; or
>
> (4) has concealed himself within, absconded, or absented himself from the Commonwealth."

Significantly, pursuant to Pa. R. Civ. P. 1287, the plaintiff, in a fraudulent debtor's attachment proceeding, is

compelled to file bond in either double the amount claimed or double the estimated value of the property to be attached, with security approved by the prothonotary, conditioned that the plaintiff shall pay the defendant or any garnishee all legal costs, fees and damages which they may sustain by reason of the attachment if it is adjudged either that the cause of action or the ground for attachment is not established. There is no such language in the foreign attachment rules.

The interest of a creditor against a potentially absconding or potentially insolvent debtor could be protected by drawing the foreign attachment rules more narrowly, much in the way that the fraudulent debtor's attachment rules are drawn. The interests of the debtor could be more adequately protected by requiring the posting of bond.[71]

Thus we express grave doubt, as well, as to whether the foreign attachment rules are sufficiently narrowly drawn to protect a valid state or creditor interest.

The Court's forebodings have been presaged by several recent case notes published in the law reviews. In Attachment and Garnishment, 68 Mich. L. Rev. 986, 1004 (1970), the commentator there remarked as follows:

> "In order for a court to hold that prejudgment attachment of tangible property unconstitutionally deprives a defendant of a protected property interest, the court must be persuaded that the alleged debtor's interests outweigh the substantial public concerns supporting seizure.
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> * * *
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> The chief public interests advanced in support of prejudgment foreign attachment are the state's right to

71. The presence of a bond requirement protecting the debtor was one factor which influenced the court in Epps v. Cortese, *supra*, to reject the constitutional challenge to the Pennsylvania Rules of Civil Procedure pertaining to replevin with bond.

control controversies arising within its borders and the state's interest in providing the protection of state courts to its citizens in their dealings with non-residents. The use of prejudgment foreign-attachment procedures to achieve these goals, however, has been severely criticized in light of modern developments in the law relating to personal jurisdiction. The critics contend that, since long-arm statutes make personal jurisdiction generally available in cases in which the non-resident defendant has sufficient contacts with the forum state to create a genuine state interest, quasi in rem jurisdiction established by prejudgment foreign attachment is likely to be used only when the state has no legitimate interest in the dispute. If this criticism is valid, assertion of jurisdiction by foreign attachment advances no state interests that are not already fully protected. Hence, the determination of the constitutionality of various forms of prejudgment attachment and garnishment should be unaffected by the fact that the attachment is used to establish jurisdiction, at least if there are long-arm statutes that make personal jurisdiction readily available."

See also an article by Carrington entitled The Modern Utility of Quasi In Rem Jurisdiction, 76 Harv. L. Rev. 303 (1962), where the author pointed out:

> "At the most the suggestion argues only for quasi in rem commencement conditioned upon a showing by the plaintiff that such exercise of jurisdiction is necessary to avoid unnecessary litigation or absconding.";

and a note at 1970 Wis. L. Rev. 181, 190, where the writer observes:

> "Considering the direction taken in *Sniadach*, it is questionable whether any type of prejudgment garnishment will withstand a due process challenge."

Neither are our doubts removed by reference to the honored notion of due process as the "settled usage both in England and in this country", Hurtado v. California, 110 U. S. 516, 528, 4 S. Ct. 111, 117, 28 L. Ed. 232 (1884), or, put differently.

> "those settled usages and modes of proceeding existing in the common and statue [sic] law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition, by having been acted on by them after the settlement of this country." Murrays' Lessee v. Hoboken Land & Improvement Co.[72]

For, as we have seen above,[73] the settled usage in England was that attachment was a means of securing judgment over the person alone, and not a means to secure execution in advance. Even the lower court opinion in McInnes v. McKay, 127 Me. 110, 141 A. 699 (1928), aff'd per curiam, 279 U. S. 820, 49 S. Ct. 344, 73 L. Ed. 975 (1929), the case upon which our decision not to invalidate the foreign attachment rules must ultimately turn, points this out:

> " 'The practice of attaching the effects of a defendant, and holding them to satisfy a judgment, which the plaintiff may recover, when perhaps judgment may be for the defendant, is unknown to the common law, and is founded on our statute law, explained by an

72. 59 U. S. (18 How.) 272, 277, 15 L. Ed. 372 (1856).
73. *See* p. 1338, *supra*.

> usage founded in the ordinances in force under the colonial charter.' [Parsons, C. J., in Bond v. Ward, 7 Mass., 123, 128, 5 Am. Dec. 28 (1810)]
>
> For some time under that charter attachment was, as it was at common law, merely a distress, a seizing of his chattels, to compel the defendant to appear when he did not appear on summons and answer, his chattels being restored to him when he appeared and forfeited when he did not."[74]

To summarize: we have expressed our grave doubts as to whether *Sniadach* can be narrowly read, and as to whether the Pennsylvania foreign attachment procedure is sufficiently narrowly drawn to pass procedural due process muster under the broader interpretation of *Sniadach*. "Grave doubts" are, of course, not helpful to Forbes, which seeks to dissolve the attachment; nor are they helpful to future litigants seeking guidance. But we are a lower court and are faced with precedent which prevents invalidation of the foreign attachment rules, even were we to affirmatively resolve those "grave doubts" in Forbes' favor. We turn to that precedent now.

VI. The Apparent Vitality of Ownbey v. Morgan and McKay v. McInnes.

In the *Sniadach* opinion, Mr. Justice Douglas, speaking for the Court, made reference to two older Supreme Court

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74. 127 Me. at 114, 141 A. at 701. The statute involved in *McKay*, like the one involved in Black Watch Farms v. Dick, *supra*, was a general attachment statute, common to the New England states which have been referred to as "creditor states". *See* 38 Yale L. J. 376 (1929). According to the Maine Supreme Court, the procedure was metamorphosized there into one securing execution in advance of judgment in 1701. In Pennsylvania, the metamorphosis apparently occurred much later.

cases [75] upholding prejudgment and hearing attachment procedures against constitutional attack:

> "Such summary procedure may well meet the requirements of due process in extraordinary situations. Cf. Fahey v. Mallonee, 332 U. S. 245, 253-254, 67 S. Ct. 1552, 1554-1556, 91 L. Ed. 2030; Ewing v. Mytinger & Casselberry, Inc., 339 U. S. 594, 598-600, 70 S. Ct. 870, 872-873, 94 L. Ed. 1088; *Ownbey v. Morgan*, 256 U. S. 94, 110-112, 41 S. Ct. 433, 437-438, 65 L. Ed. 837; Coffin Bros. & Co. v. Bennett, 277 U. S. 29, 31, 48 S. Ct. 422, 423, 72 L. Ed. 768. But in the present case no situation requiring special protection to a state or creditor interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition." [emphasis added], 395 U. S. at 339, 89 S. Ct. at 1821;

and:

> "A procedural rule that may satisfy due process for attachments in general, see *McKay v. McInnes*, 279 U. S. 820, 49 S. Ct. 344, 73 L. Ed. 975, does not necessarily satisfy procedural due process in every case." [emphasis added]. 395 U. S. at 340, 89 S. Ct. at 1822.

Ownbey was an action brought by foreign attachment proceedings in the State of Delaware, under which the sheriff attached 33,000 shares of stock owned by defendant, a Colorado resident, in a Delaware corporation without notice or hearing.

The then Delaware foreign attachment procedure was unusual. It prevented the entry of appearance and defense, except by corporate defendants, without the entering of special bail. On the other hand, any judgment entered

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75. McKay v. McInnes, 279 U. S. 820, 49 S. Ct. 344, 73 L. Ed. 975 (1929); Ownbey v. Morgan, 256 U. S. 94, 41 S. Ct. 433, 65 L. Ed. 837 (1921).

pursuant to the statute was not *in personam* and was valid only against the property attached.[75a] The Supreme Court upheld the Delaware statute against due process attack, stating, *inter alia:*

> "The due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall. * * * But a property owner who absents himself from the territorial jurisdiction of a state, leaving his property within it, must be deemed ex necessitate to consent that the state may subject such property to judicial process to answer demands made against him in his absence, according to any practicable method that reasonably may be adopted. A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the states as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law, even if it be taken with its ancient incident of requiring security from a defendant who after seizure of his property comes within the jurisdiction and seeks to interpose a defense.
> * * *
>
> However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. * * * Neither does it, as we think, require a state to relieve the hardship of an ancient and familiar method of pro-

75a. According to the Supreme Court opinion, this procedure was changed by the Delaware legislature so as to permit appearance and defense without the entry of special bail while the appeal was pending. 256 U. S. at 106, 41 S. Ct. at 436.

cedure by dispensing with the exaction of special security from an appearing defendant in foreign attachment." 256 U. S. at 110-112, 41 S. Ct. at 438.

In McKay v. McInnes, *supra,* the Supreme Court wrote no opinion. It simply upheld the constitutionality of Maine's general attachment law against a procedural due process attack "on the authority of Ownbey v. Morgan." The Maine attachment practice was like the Connecticut practice which we have discussed. It authorized attachment without notice or hearing in any civil action and was not limited to non-residents. Under the Maine procedure, the attachment continues until thirty days after judgment.

The manner in which the Supreme Court cites *Ownbey* and *McKay* is interesting. *Ownbey* is cited with a "cf.", whereas the *McKay* citation is preceded by the word "see". This factor heightens the central question in the case at bar: does *Sniadach* affirm *Ownbey* and *McKay?*

Certainly, they are not expressly affirmed. But, at least, however, their vitality has been recognized.[76] The thrust of the analysis contained in this opinion is directed to the theory that, were it to have *Ownbey* and *McKay* before it directly today, the United States Supreme Court might well decide them differently. In view, however, of the language of *Sniadach,* which, at least, recognizes the vitality of *Ownbey* and *McKay,* even if it does not impliedly approve of them, a United States District Judge is not at liberty to ignore their precedential effect. In view of the increasing volume of litigation in this field, there is every reason to believe that the Supreme Court will soon have an opportunity to rule upon and reconsider, if it wishes, the doctrine of *Ownbey* and *McKay.* In view, then, of the ref-

76. The same conclusion was reached by Judge Zampano in Black Watch Farms v. Dick, *supra.*

erences in *Sniadach* to *Ownbey* and *McKay,* we hold that the Pennsylvania foreign attachment rules are valid.[77]

Forbes has ingeniously argued that, even were we to conclude that the foreign attachment rules do not violate the fourteenth amendment due process, we can conclude that they violate fifth amendment due process for the reason that Rule 64 of the Federal Rules of Civil Procedure in effect "adopts" the Pennsylvania foreign attachment rules as the federal rules for purposes of a suit removed here on diversity grounds. The simple answer to this contention is that there is, under the cases, no difference between the fifth and fourteenth amendment due process.[78]

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77. Forbes has urged upon us that the seizure of its property pursuant to the writ of foreign attachment constitutes an illegal seizure without probable cause or warrant in violation of the fourth amendment, citing to Camara v. Municipal Court, 387 U. S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967); See v. Seattle, 387 U. S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967); and Laprease v. Raymour Furniture Co., *supra.* It is patent that there was no entry onto Forbes' physical premises or any invasion of anything touching one's physical person. We do not deem Fourth Amendment allegations to be grounds for dissolving the attachment.

Forbes has also urged that the foreign attachment procedure violates Article Four, Section 2, Clause 1 of the Constitution which provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. In essence, Forbes contends that this clause means that a state cannot deal with a person outside its borders in a different manner from those within its borders. Forbes argues that the foreign attachment rules impose different treatment upon non-residents than they do upon residents, even though both may be subject to *in personam* jurisdiction, either by virtue of the Pennsylvania rules or the long-arm statute. The problem with that argument is that it has been held consistently that corporations are not citizens within the meaning of Art. 4, § 2. Hemphill v. Orloff, 277 U. S. 537, 48 S. Ct. 577, 72 L. Ed. 978 (1928); Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 45, 20 S. Ct. 518, 44 L. Ed. 657 (1900); Norfolk & W. R. R. v. Pennsylvania, 136 U. S. 114, 118, 10 S. Ct. 958, 34 L. Ed. 394 (1890); Paul v. Virginia, 75 U. S. (8 Wall.) 168, 19 L. Ed. 357 (1869); Augusta Bank v. Earle, 38 U. S. (13 Pet.) 519, 10 L. Ed. 274 (1839). Therefore, we cannot quash the attachment on this ground.

78. Bowles v. Willingham, 321 U. S. 503, 518, 64 S. Ct. 641, 88 L. Ed. 892 (1944); Foley Securities Corp. v. Commissioner, 106 F. 2d 731, 736 (8th Cir. 1939).

VII. Should the Attachment Be Dissolved on the Ground of Equitable Estoppel?

Forbes has asserted, as an additional ground for its motion to dissolve the foreign attachment, the ground of equitable estoppel.

Prior to 1967, a foreign attachment could be effected upon a foreign corporation, whether or not that corporation was registered in Pennsylvania. In 1967, the rule was amended so that a foreign corporation which is registered can no longer have its property attached. Pa. R. Civ. P. 1252(3). Forbes asserts that its failure to be presently registered is due solely to the failure of plaintiff Lebowitz, as its president, to effect registration. It refers to Lebowitz' employment agreement, which provides in paragraph 2 as follows:

> "2. As President, Lebowitz shall be resonible [*sic*] for and his duties shall include all phases of activities of the Corporation and in the fulfillment thereof, shall develop sources of funds for the Corporation's leasing program; organize a business promotion program; establish procedures for credit control and protection of the security interest of the Corporation with regard to leases and loans made by the Corporation; provide for the maintenance of adequate and customary system of books of account, records and preservation of documents relating to the business of the Corporation: and otherwise undertake all other steps customary, necessary or desirable for the sound and efficient operation of a leasing and financing business organization."

From this contractual provision, Forbes asserts that:

> "Because 'Lebowitz * * * [was] responsible for and his duties * * * include[d] all phases of activities of

the corporation * * *, Lebowitz should have registered Forbes"

Forbes further contends that: (1) having failed to effect the registration, Lebowitz now seeks to utilize a procedure that would be unavailable to him had he complied with his obligation; and (2) having sought the equity jurisdiction of the Court and having caused a writ of foreign attachment to issue thereunder, Lebowitz comes to the Court with unclean hands seeking to gain from his own nonfeasance. At the argument on the motion, Forbes did not assert that it had evidence that the failure to register was a deliberate one, conceived with a view to instituting an action by way of a foreign attachment in the event of a falling out between the parties.

The estoppel theory is also an ingenious one. It's novelty, however, has apparently inveighed against the finding of a case on point, either pro or con. We hold that the doctrine of equitable estoppel is not applicable to these facts. We do not agree that the contractual provision cited to is sufficient to impose the duty to effect registration upon Lebowitz, who is a layman; if it did, it imposed it upon him in his capacity as a corporate officer, not as an individual.

Forbes relies upon two cases. The first is Lawrence Warehouse Co. v. Menary, 143 F. Supp. 883 (S. D. Iowa 1956), where a warehouseman was not permitted to sue guarantors of notes covering beef carcasses within his warehouse, when he in breach of contract previously released the carcasses and made possible a theft of the goods. The other is Tempo Music, Inc. v. Myers, 407 F. 2d 503 (4th Cir. 1969), where a licensing agency for composers, authors, and publishers which failed to comply with a proprietor's request for a list of its protected compositions was held to be estopped from asserting infringement against that same proprietor.

We agree with plaintiff that these cases can be distinguished on several grounds:

1. In both cases, the wrongful conduct of the plaintiff gave rise to the cause of action he later attempted to sue upon. In this case, Lebowitz' cause of action did not arise from the registration or nonregistration of Forbes as a foreign corporation, but from the alleged breach of contract by Forbes.

2. Equitable estoppel operates to bar one with unclean hands from asserting a cause of action, not from selecting how a valid cause of action could be brought.

3. Forbes must show reliance on Lebowitz' alleged duty to register Forbes, an allegation which Forbes did not make. Brown v. City of Pittsburgh, 409 Pa. 357, 186 A. 2d 399 (1962); Sunseri v. Sunseri, 358 Pa. 1, 55 A. 2d 370 (1947); Northwestern Nat'l Bank v. Commonwealth, 345 Pa. 192, 27 A. 2d 20 (1942).

Accordingly, we conclude that the doctrine of equitable estoppel is not applicable and that the foreign attachment cannot be quashed on that ground.

VIII. Conclusion.

The motion to quash the foreign attachments which, in view of the foregoing analysis, we deny, was based upon constitutional and equitable estoppel grounds. The motion does not contain an averment that the attachments, if legally valid, were excessive. If counsel for Forbes in proper form applies, we will treat the motion to quash as a motion to reduce the attachments and hold a hearing thereon, at which time we will determine whether the amount attached is inequitable when measured against the probable recovery in the case.

ORDER OF THE U. S. DISTRICT COURT.

ORDER.

AND Now, this 15th day of April 1971, the Motion of Forbes Leasing and Finance Corporation to Quash Foreign Attachments is hereby DENIED.

EDWARD R. BECKER, *J.*

ORDER OF U. S. DISTRICT COURT AMENDING ORDER OF APRIL 15, 1971.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 71-369.

MARVIN LEBOWITZ

Plaintiff

v.

FORBES LEASING AND FINANCE CORPORATION (A FOREIGN CORP.); BENJAMIN OGUREK; ORCHID FARALES; NETWORK CINEMA CORPORATION AND JERRY ENTMAN

Defendants.

ORDER.

BECKER, *J.*

AND NOW, this 23rd day of April 1971, the Order of this Court dated April 15, 1971 is hereby amended to read as follows:

1) The Motion of Forbes Leasing and Finance Corporation to Quash Foreign Attachments is hereby Denied.

2) This Court is of the opinion, pursuant to 28 U. S. C. § 1292(b) that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this Order may materially advance the ultimate termination of this litigation.

s/ EDWARD R. BECKER,
Edward R. Becker, *J.*

UNITED STATES CONSTITUTION.

THE COMMERCE CLAUSE.

Article I Section 8: To regulate Commerce with the foreign Nations, and among the several States, . . .

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL RULES OF CIVIL PROCEDURE.

Rule 64.

SEIZURE OF PERSON OR PROPERTY.

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

PENNSYLVANIA RULES OF CIVIL PROCEDURE, 1971.

Foreign Attachment.

Rule 1251. Conformity.

Except as otherwise provided in this chapter, the procedure in an action commenced by a writ of foreign attachment shall be in accordance with the rules relating to the appropriate action at law or in equity.

Rule 1252. Scope.

A foreign attachment may be issued to attach property of a defendant not exempt from execution upon any cause of action at law or in equity, other than an action ex delicto arising from acts committed outside the Commonwealth, which is not required to be joined with an action of assumpsit under Rule 1020(d)(1) in which the relief sought includes a judgment or decree for the payment of money when

(1) the defendant is an individual who is a nonresident of the Commonwealth, even though he is present in the Commonwealth;

(2) the defendant is a partnership or an unincorporated association without a regular place of business in the Commonwealth and the action is against the defendant in its firm or association name, even though one or more members of the partnership or association are present in or are residents of the Commonwealth;

(3) the defendant is a foreign corporation or similar entity which is not registered in the Commonwealth.

Rule 1253. Garnishee.

Any person may be made a garnishee and shall be deemed to have possession of property of the defendant if he

(1) owes a debt to the defendant;

(2) has property of the defendant in his custody, possession or control;

(3) holds as fiduciary property in which the defendant has an interest; or

(4) holds the legal title to property of the defendant, whether or not in fraud of creditors.

Rule 1254. Venue.

(a) An attachment against personal property of the defendant may be issued in and only in a county in which

(1) the property is located, or

(2) a garnishee may be served.

(b) An attachment against real property of the defendant may be issued in and only in a county in which all or any part of the property is located.

Rule 1255. Commencement and Indexing.

(a) The attachment shall be commenced by filing with the prothonotary a praecipe for a writ which shall direct the sheriff to attach such specific items of property of the defendant as are set forth in the praecipe and all other property of the defendant. The praecipe shall state the amount of the plaintiff's claim.

(b) The prothonotary shall immediately enter the attachment against the defendant in the judgment index.

(c) If the sheriff attaches real property, legal title to which is held by the garnishee, the prothonotary on praecipe of the plaintiff, shall immediately enter the attachment against the garnishee in the judgment index.

Rule 1256. Ancillary Attachment.

A foreign attachment may be issued in a pending action if at the time of issue a foreign attachment could have been used to commence the action. Unless a complaint has already been filed in which the ground for attachment sufficiently appears, the plaintiff shall file a complaint or amended complaint within five (5) days as provided in Rule 1265(a).

Rule 1257. Service of Writ upon Garnishee or Person in Possession.

The sheriff shall serve the writ in the same manner as a writ of summons in assumpsit upon the named garnishee and upon any person not named as garnishee who is found in possession of property of the defendant, and shall furnish the person served with an additional copy of the writ for each defendant.

Rule 1258. Attachment of Personal Property. Disposition of Perishable Property.

(a) Service of the writ upon the garnishee shall attach all personal property of the defendant in the possession of the garnishee at that time and, if any property of the defendant is in his possession at the time of service, shall also attach all personal property which shall come into his possession until judgment is entered against him.

(b) If no one is found in actual possession the sheriff shall attach the property by manual seizure.

(c) When perishable property is attached, the court may make such order relating to its preservation, sale or disposition as it shall deem proper.

Rule 1259. Attachment of Contents of Safe Deposit Box.

(a) Property of the defendant which is in a safe deposit box shall be attached by serving as garnishee the depository or custodian of the box.

(b) Service of the writ on a garnishee shall enjoin him from opening or permittng the opening of the box except as directed by the court.

(c) The court, on petition of the plaintiff, shall grant a rule on the defendant, the garnishee and any person who has the right to open the box to show cause why the box should not be opened in the presence of the sheriff, by force if necessary, and the property of the defendant found therein delivered to the sheriff. If the defendant, the garnishee or a person who has the right to open the box cannot be served personally with the petition and rule, he shall be served by sending him a copy of the petition and rule by registered mail directed to his last known address, or if no address is known, and an affidavit to that effect is filed, then by publication in such manner as the court by general rule or special order shall direct.

(d) The court shall not order the opening of a box by force unless the plaintiff furnishes bond or security deemed sufficient by the court to indemnify the garnishee against loss caused by the opening of the box.

Rule 1260. Attachment of Real Property. Liens and Rents.

(a) Service of the writ upon the person in actual possession of real property shall attach the property. If no

one is found in actual possession, the sheriff shall attach the property by posting a copy of the writ on the most public part of the property and by sending the defendant a copy of the writ and a statement of the real property attached by registered mail directed to his last known address, or if no address is known, and an affidavit to that effect is filed, then by publication in such manner as the court by general rule or special order shall direct.

(b) A mortgage, judgment lien or incorporeal hereditament owned by a defendant may be attached by serving as garnishee the owner of the real property subject thereto. If the garnishee cannot be served as provided in Rule 1257, a copy of the writ shall be posted on the most public part of the property and the garnishee served by handing a copy of the writ to the person in actual possession of the property or if no one is in actual possession, then by sending the garnishee a copy of the writ, together with an inventory of the property attached, by registered mail directed to his last known address or if no address is known, and an affidavit to that effect is filed, then by publication in such manner as the court by general rule or special order shall direct.

(c) Service of the writ upon a tenant attaches rent due by him at that time and also all rent which shall thereafter become due by him until judgment is entered against him.

(d) The court, on petition of the plaintiff, may order the sheriff to collect any rent attached, to exercise any powers possessed by the defendant as landlord and to account to the court.

Rule 1261. Manual Seizure of Property.

The sheriff may, or at the direction of the plaintiff shall, take manual possession of any tangible personal prop-

erty of the defendant, including the contents of safe deposit boxes. Thereafter he shall hold the property until determination of the action, unless

(1) otherwise authorized in writing by the plaintiff;

(2) the attachment is dissolved;

(3) the property is released from the attachment; or

(4) the plaintiff fails to give any bond or security which may be required by Rule 1262.

If the Sheriff does not retain possession of the property he shall return it to the person from whom it was taken.

Rule 1262. Bond not Required.

No bond or security shall be required of the plaintiff by the sheriff, except for the actual or estimated cost of retaining possession of the attached property.

Rule 1263. Reissuance of Writ.

(a) A writ may be reissued even though it has been served.

(b) Other defendants and garnishees may be named in a reissued writ.

Rule 1264. Sheriff's Return.

The return of the sheriff shall include an inventory of property manually seized, a description sufficient to identify real property attached, and the names and addresses of all persons served. If any person served was not named as a garnishee in the writ he shall be added as a garnishee.

Rule 1265. Complaint. Service. Amendment. Non Pros.

(a) Plaintiff shall file with the praecipe, or within five (5) days after filing the praecipe, a complaint setting forth

his cause of action and the ground for attachment. If no complaint is filed within five (5) days, the prothonotary upon praecipe of the defendant or garnishee shall enter a judgment of non pros against the plaintiff.

(b) The complaint shall be served upon the garnishee in the same manner as in an action of assumpsit. A copy shall also be served upon the defendant if he has been served with the writ, appeared or filed a bond. An additional copy of the complaint shall be furnished to the garnishee for each defendant who has not been served, appeared or filed a bond.

(c) The plaintiff may amend his complaint in the same manner as in assumpsit, including averments as to the non-residence of the defendant at the time of the commencement of the action.

Rule 1266. Garnishee's Report. Examination of Garnishee.

(a) Within twenty (20) days after service of the writ upon him, a garnishee shall file in the office of the prothonotary a report under oath setting forth in detail all property of the defendant in his possession. If any property attached is immune or exempt from attachment, the report shall so state.

(b) If a garnishee fails to file the report within the time specified, the court on motion shall order the garnishee to appear to be examined orally under oath with respect to the information required. The court may enforce its order by attachment of his person.

Rule 1267. Notice by Garnishee.

(a) Upon being served with the writ, the garnishee shall promptly forward a copy to the defendant.

(b) Upon being served with the complaint, the garnishee shall promptly forward a copy to any defendant who has not been served, appeared or filed a bond.

(c) Upon filing his report, the garnishee shall promptly forward a copy to the defendant.

(d) A copy is forwarded within the requirement of this rule when it is delivered to the defendant by a competent adult at any place within or outside the Commonwealth in the manner prescribed for the service of a writ of summons in an action of assumpsit or when it is mailed to the defendant by registered mail directed to his last known address.

Rule 1268. Garnishee. Duty to Defend. Preliminary Objections to Attachment.

(a) If the garnishee forwards copies to the defendant as provided in Rule 1267, he shall be under no duty to resist the attachment or defend the action in any manner but may, prior to judgment against the defendant, resist the attachment by preliminary objections.

(b) The defense of immunity or exemption of the property from attachment and the defense that no property of the defendant was in the possession of the garnishee at the time of service of the attachment may be pleaded by the garnishee by preliminary objection but are not waived if not so pleaded.

Rule 1269. Action as to Defendant.

(a) The plaintiff may direct the sheriff to serve the defendant with the writ or complaint but failure to serve or attempt to serve the defendant shall not affect the validity of any attachment made in accordance with these rules.

(b) If the defendant is served with the writ or complaint, appears or files a bond or security, the action continues as if commenced by personal service of a summons or complaint.

Rule 1270. Default Judgment against Defendant.

The plaintiff, after the expiration of forty-five (45) days from the execution of the writ, may take judgment against a defendant who has not been served, has not appeared and has not filed a bond or security provided

(1) a complaint has been filed at least twenty (20) days prior to judgment; and

(2) no preliminary objections are pending.

Rule 1271. Defenses. Immunity or Exemption. No Property Attached.

The defense of immunity or exemption of property from attachment and the defense that no property of the defendant was in the possession of the garnishee at the time of service of the attachment, may be raised by the defendant without thereby subjecting himself to the jurisdiction of the court

(1) by preliminary objection under Rule 1017(b)(1), or

(2) by a petition to open judgment, filed at any time before the garnishee files his answer to interrogatories.

Rule 1272. Dissolution of Attachment. Release of Property. Bond.

(a) An attachment is not dissolved by service of the writ or complaint on the defendant nor by his appearance.

(b) An attachment is not dissolved by the death or dissolution of a defendant or garnishee.

(c) An attachment is dissolved when any person or party

(1) files with the prothonotary a bond, with security approved by the prothonotary, in double the amount of the plaintiff's claim or in such lesser amount as the court may direct, naming the Commonwealth of Pennsylvania as obligee, conditioned to pay the plaintiff, if final judgment is entered in his favor, the amount to which he is found entitled, including interest and costs, or

(2) deposits with the prothonotary, or with the sheriff for the prothonotary, to be held by him upon the same condition as the bond, security in the form of legal tender of the United States in an amount equal to the plaintiff's claim, including probable interest and costs.

(d) At any time after judgment against the defendant, the prothonotary, on praecipe of the garnishee, shall enter a rule on the plaintiff to (1) move for judgment on the garnishee's report, as provided in Rule 1276(b) or (2) file interrogatories. If the plaintiff fails to comply with the rule within twenty (20) days after service, the prothonotary, upon praecipe of the garnishee, shall enter judgment of non-pros against the plaintiff and in favor of the garnishee, which shall dissolve the attachment as to the garnishee.

(e) At any time after the filing of answers to the interrogatories and service of a copy thereof upon the plaintiff, the prothonotary, on praecipe of the garnishee, shall enter a rule on the plaintiff to (1) seek judgment against the garnishee under Rule 1277(b) or (2) place the issue be-

tween the plaintiff and garnishee upon the list for trial. If the plaintiff fails to comply with the rule within twenty (20) days after service, the prothonotary, on praecipe of the garnishee, shall enter judgment of non pros against the plaintiff and in favor of the garnishee, which shall dissolve the attachment as to the garnishee.

(f) The court on petition of any party may, at any time after notice and hearing, dissolve the attachment if the plaintiff has not prosecuted the action with due diligence.

(g) Specific property is released without dissolving the attachment when any person or party gives bond or security, as provided by Subdivision (c) of this rule, in an amount based upon the value of the property to be determined by the court, and conditioned to pay the plaintiff, if final judgment is entered in his favor, the amount to which he is found entitled or the value of the property released, whichever is less.

(h) The court on petition of any party may, at any time after notice and hearing, release part of the attached property if the value of the property attached is excessive compared to the amount in controversy.

(i) If the attachment is dissolved or property is released the property shall be returned to the person from whose possession it was taken.

Rule 1273. Objections to Security.

The court on the petition of any person or party, may, at any time after notice and hearing

(1) review the action of the prothonotary in approving or rejecting the bond or security offered;

(2) increase or decrease the amount of any bond or security;

(3) strike off a bond improperly filed; or

(4) permit the substitution of a bond or security and enter exoneration of a prior bond.

Rule 1274. Interrogatories to Garnishee.

(a) After the entry of judgment against the defendant, the plaintiff may file and serve interrogatories directed to the garnishee respecting property of the defendant in his possession. The plaintiff in his interrogatories may require the garnishee to include in his answer, so far as relevant, the names and addresses of persons taking part in any transaction, the specific amount of any debt, the value and location of any property and the nature and amount of consideration given for any transfer of property.

(b) The interrogatories shall be endorsed with a notice to answer within twenty (20) days after service.

Rule 1275. Interrogatories. Procedure.

(a) The procedure between the plaintiff and the garnishee shall, as far as practicable, be the same as though the interrogatories were a complaint and the answer of the garnishee were an answer in assumpsit.

(b) The garnishee in his answer under "new matter" may include the defenses of the immunity or exemption of property, the defense that no property of the defendant was in the possession of the garnishee at that time of service of the attachment, or any defense or counterclaim which he could assert against the defendant is sued by him, but may not assert any defenses on behalf of the defendant

against the plaintiff or otherwise attack the validity of the attachment.

Rule 1276. Judgment against Garnishee upon Default or Admission in Report.

(a) If the garnishee fails to file a report as required by Rule 1266, the prothonotary on praecipe of the plaintiff and after entry of judgment against the defendant, shall enter judgment against the garnishee in the same amount as the judgment of the plaintiff against the defendant, together with interest and costs.

(b) The plaintiff may, after entry of judgment against the defendant and without filing interrogatories, enter a rule as of course on the garnishee for judgment for the property of the defendant admitted in the report to be in the garnishee's possession, but no money judgment entered against the garnishee shall exceed the amount of the judgment of the plaintiff against the defendant together with interest and costs. The entry of judgment shall not bar the right of the plaintiff to proceed against the garnishee as to any other property.

(c) The garnishee, in his answer to the rule, may include as "new matter" the defenses of immunity or exemption of property, the defense that no property of the defendant was in the possession of the garnishee at the time of service of the attachment, or any defense of counterclaim which he could assert against the defendant if sued by him, but may not assert any defenses on behalf of the defendant against the plaintiff or otherwise attack the validity of the attachment.

(d) The plaintiff may, at his option, treat the report and the answer to the rule as the equivalent of an answer to interrogatories.

Rule 1277. Judgment against Garnishee upon Default or Admission in Answer to Interrogatories.

(a) If the garnishee within the time allowed by these rules fails to file an answer to interrogatories endorsed with a notice to plead, the prothonotary, on praecipe of the plaintiff, shall enter judgment in favor of the plaintiff and against the garnishee in the same amount as the judgment of the plaintiff against the defendant, together with interest and costs.

(b) The prothonotary, on praecipe of the plaintiff, shall enter judgment against the garnishee for the property of the defendant admitted in the answers to interrogatories to be in the garnishee's possession, but no money judgment entered against the garnishee shall exceed the amount of the judgment of the plaintiff against the defendant together with interest and costs. The entry of judgment shall not bar the right of the plaintiff to proceed against the garnishee as to any further property.

Rule 1278. Judgment against Garnishee on the Pleadings or After Trial.

If the court enters judgment for the plaintiff and against the garnishee upon pleadings or after trial, the judgment shall be for the property of the defendant found to be in the garnishee's possession, but no money judgment entered against the garnishee shall exceed the amount of the judgment of the plaintiff against the defendant together with interest and costs.

Rule 1279. Content of Judgment against Garnishee. Execution.

(a) A judgment entered against the garnishee under Rule 1276(b), 1277(b) or 1278 shall

(1) be in the form of a money judgment if the garnishee owes a debt to the defendant and

(2) specify any other property of the defendant in the possession of the garnishee.

(b) If a money judgment is entered against the garnishee the plaintiff may have execution against the garnishee generally for the amount of the judgment so entered.

(c) If judgment is entered against the garnishee for specific property of the defendant determined to be in the possession of the garnishee, the plaintiff may have execution against the property. If the garnishee without good cause fails to make the property available to the officer for execution, the plaintiff upon leave of court may have execution against the garnishee generally for the amount of the plaintiff's judgment against the defendant, together with interest and costs.

INDEX.

	Page
I. Opinions Below	1
II. Jurisdiction	2
III. Question Presented	2
IV. Rules of Civil Procedure and Constitutional Provisions Involved	2
V. Counter-Statement of the Case	3
VI. Argument	6
A. Forbes' Filing of a Bond After the Decision of the Court of Appeals Has Rendered This Petition Moot	6
B. The Decision Below Is Clearly Correct, and Does Not Present a Substantial Federal Question	7
1. The Pennsylvania Foreign Attachment Procedures Assure Procedural Due Process	7
2. *Sniadach* Was Based on a Denial of Due Process Caused by a Procedure So Onerous as to Preclude the Individual Debtor From Receiving a Meaningful Hearing. The Procedure Herein Did Not Deprive Petitioner of a Meaningful Hearing	9
3. The Pennsylvania Foreign Attachment Rules Serve a Legitimate Governmental and Creditor Interest in the Present Case	11
4. There Is No Conflict Between the Decision Below and the Decision of the Supreme Court of California on an Issue of Federal Constitutional Law	12
a. *Randone* Rests Upon Adequate and Independent Nonfederal Grounds	13
b. *Randone* Is Clearly Distinguishable From the Decision Below	13

INDEX (Continued).

Page

C. This Case Presents No Substantial Questions Under the Fourth Amendment 14

VII. Conclusion 15

Supplemental Appendix:

United States Constitution, Article III, Section 2, Clause 1 SA 1

California Constitution, Article I, Section 13 ..... SA 1

Order of the United States District Court for the Eastern District of Pennsylvania ..... SA 2

Stipulation and Order of the United States District Court for the Eastern District of Pennsylvania ..... SA 4

TABLE OF CITATIONS.

Cases:	Page
American Olean Tile Co. v. Zimmerman, 317 F. Supp. 150 (D. Ha. 1970)	11
American Surety Co. v. Baldwin, 287 U. S. 156 (1932)	7
Andrew Brown Co. v. Painters Warehouse, Inc., 11 Ariz. App. 571, 466 P. 2d 790 (1970)	11
Armstrong v. Manzo, 380 U. S. 545 (1965)	7
Bell v. Burson, 402 U. S. 535 (1971)	7, 10
Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100 (D. Conn. 1971)	11
Boddie v. Connecticut, 401 U. S. 371 (1971)	7, 8
Brunswick Corp. v. J & P, Inc., 424 F. 2d 100 (10th Cir. 1970)	11
Coffin Brothers v. Bennett, 277 U. S. 29 (1927)	7
Department of Mental Hygiene v. Kirchner, 60 Cal. 2d 716, 388 P. 2d 720, 36 Cal. Rptr. 488 (1964)	13
Department of Mental Hygiene of California v. Kirchner, 380 U. S. 194 (1965)	13
D. H. Overmyer Co. v. Frick Co., 405 U. S. 174 (1972)	7
Fuentes v. Faircloth, 317 F. Supp. 954 (S. D. Fla. 1970)	11
Goldberg v. Kelly, 397 U. S. 254 (1970)	10
Grannis v. Ordean, 234 U. S. 385 (1914)	7
Henry v. Mississippi, 379 U. S. 443 (1965)	13
In re 300 W. 15th Street Realty Co., 26 N. Y. 2d 538, 260 N. E. 2d 534 (1970)	11
Johnson v. Cunningham, 12 Cal. App. 3d 123, 90 Cal. Rptr. 487 (1970)	11
McKay v. McInnes, 279 U. S. 820 (1929)	12
McInnes v. McKay, 127 Me. 110, 141 A. 699 (1928)	12
Phillips v. Commissioner, 283 U. S. 589 (1931)	7
Powell v. McCormack, 395 U. S. 486 (1969)	6

TABLE OF CITATIONS (Continued).

Cases (Continued): Page

Randone v. Appellate Department of the Superior Court, 5 Cal. 3d 536, 488 P. 2d 13, 96 Cal. Rptr. 709 (1971), petition for cert. filed sub nom. Northern California Collection Services, Inc. v. Randone, 40 U. S. L. W. 3375 (U. S. Jan. 11, 1972) 12, 13, 14

Sheryl Records, Inc. v. The Cyrkle, 431 Pa. 299, 245 A. 2d 454 (1968) 8

Sniadach v. Family Finance Corp., 395 U. S. 337 (1969) 2, 5, 7, 9, 10, 11

Termplan, Inc. v. Superior Court, 105 Ariz. 270, 463 P. 2d 68 (1969) 11

Statute:

15 Pa. Stat. § 2011 (1968) 11

Rules of Civil Procedure:

Pennsylvania Rules of Civil Procedure:

Rules 1251 through 1279, inclusive (Foreign Attachment Rules) 5, 8, 11, 12, 14

Rules 1272 8

United States Constitution:

Article III, Section 2 ..... 2, 6

Fourth Amendment 14, 15

Fifth Amendment 13

Fourteenth Amendment 13

California Constitution:

Article I, Section 13 ..... 2, 13

Miscellaneous Authority:

Note, Cases Moot on Appeal: A Limit on the Judicial Power 103 U. Pa. L. Rev. 772 (1955) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-1403.

FORBES LEASING AND FINANCING CORPORATION,

Petitioner,

v.

MARVIN LEBOWITZ,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

I. OPINIONS BELOW.

The opinion of the District Court is reported at 326 F. Supp. 1335 (App. A10-A50). The opinion of the Court of Appeals for the Third Circuit and the concurring opinion are reported at 456 F. 2d 979 (App. A1-A7).

II. JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition (Petition at 2).

III. QUESTION PRESENTED.

Does the decision of this Court in *Sniadach v. Family Finance Corporation*, 395 U. S. 337 (1969), which held the Wisconsin Pre-Judgment Wage Garnishment Law unconstitutional because it "as a practical matter drives a wage earning family to the wall", compel a finding that the Pennsylvania Foreign Attachment Procedure is unconstitutional?

IV. RULES OF CIVIL PROCEDURE AND CONSTITUTIONAL PROVISIONS INVOLVED.

The Rules of Civil Procedure and Constitutional Provisions involved are fully set forth in the Appendix (App. A53-A70). In addition, this case involves Article III, Section 2 of the United States Constitution, and California Constitution, Article I, Section 13, set forth in the Supplemental Appendix (SA 1).

V. COUNTER-STATEMENT OF THE CASE.

Petitioner Forbes Leasing and Financing Corporation (Forbes) is a foreign corporation incorporated in Delaware in September of 1970 and not registered to do business in Pennsylvania. Forbes is the wholly owned subsidiary of Network Cinema Corporation (Network), and is used to obtain financial commitments for Network in the latter's business of franchising mini-theatres. Neither corporation has offices in Pennsylvania.

Forbes, in September of 1970, entered into an employment agreement with Lebowitz, an individual and resident of Philadelphia, Pennsylvania, under which Lebowitz was to obtain financial commitments for Forbes and receive a salary of up to $60,000 per year plus an option to purchase twenty percent (20%) of the outstanding stock of Forbes. As an added incentive, Network entered into an agreement with Lebowitz permitting Lebowitz to purchase an additional ten percent (10%) of the stock of Forbes based on the funding commitments Lebowitz obtained.

Lebowitz rented a small office on behalf of Forbes in the Lafayette Building in Philadelphia and obtained from Forbes and Network funding commitments from the Girard Bank in December of 1970 totaling in excess of $120,000. In late January of 1971, having the commitment from the Girard Bank, the Board of Directors of Forbes in New York, without prior notice to Lebowitz, fired him as an officer, ordered the telephone company to discontinue all service to the Philadelphia office and effectively terminated Forbes' connection with Lebowitz and his office.

On January 27, 1971, Lebowitz commenced an action in the Court of Common Pleas of Philadelphia County seeking damages and an immediate preliminary injunction

against Forbes and Network and their officers to stop the defendants from removing equipment and furnishings from his office, and enjoining them from further negotiations on their own behalf with Girard Bank.

As Forbes could not be served in Philadelphia, and would not authorize its Philadelphia Counsel to accept service, Lebowitz by his Counsel, on February 1, 1971, caused a Writ of Foreign Attachment to issue attaching the accounts of Forbes at the Girard Bank and First Pennsylvania Bank totaling approximately Seventy Five Thousand Dollars.

Following the attachments, Philadelphia Counsel entered its appearance for Forbes and removed the action to the United States District Court for the Eastern District of Pennsylvania. Forbes moved to have the attachments quashed as unconstitutional under *Sniadach* but did not present any testimony to the District Court, nor were any findings of fact made by Judge Becker.

Counsel for Forbes did represent in oral argument that forty percent (40%) of Forbes' liquid assets were attached, and that its business was "paralysed" but Judge Becker did not, and indeed could not, make a finding as to the effect on Forbes of the attachment. As a result this record discloses no evidence of the financial burden, if any, placed on Forbes by the attachment.

Judge Becker did, however, erroneously report in his opinion that at "all times revelant hereto Forbes maintained an office in Philadelphia" and that Forbes "had an office and telephone in Philadelphia" (App. A36) when it was undisputed that Lebowitz had been fired, the telephone service was being discontinued and there was no one from Forbes who could have been served in Philadelphia.

In a lengthy opinion Judge Becker reluctantly denied Forbes' motion to quash the attachment, admitting that

Supreme Court precedents cited in *Sniadach* appeared to justify foreign attachment.

After the decision of the District Court, upon Forbes' motion the attached funds were consolidated into one interest bearing account at the Girard Bank (SA 2-SA 3).

On February 24, 1972 the Court of Appeals for the Third Circuit affirmed the validity of the Pennsylvania Foreign Attachment Rules.

Although Forbes admitted it could have filed the required bond (App. A32) it nevertheless asserted that its business had been "paralysed" and that "40% of its assets" had been attached (App. A31). Judge Becker attempted to explain Forbes' curious failure to file a bond in the face of financial paralysis by taking judicial notice of the "fact" that bonds require security and bond obligations appear on financial statements (App. A32).

Nevertheless Forbes promptly filed a bond after losing in the Court of Appeals. The bond filed was not in the amount of twice the claim ($400,000) but only in the amount of the attachment, approximately $75,000 (SA 4-SA 5). Forbes has had, since the filing of the bond, full and unrestricted use of the funds, plus accrued interest, and presumably is not now, if it ever was, "paralysed".

VI. ARGUMENT.

A. Forbes' Filing of a Bond After the Decision of the Court of Appeals Has Rendered This Petition Moot.

This Court's jurisdiction is limited by Article III, Section 2, of the Constitution to "cases" and "controversies". As this clause has been interpreted, this Court has constitutional jurisdiction only over actual cases and controversies between adverse interests, with respect to which the Court's judgment will be effective. *See generally Powell v. McCormack*, 395 U. S. 486 (1969); Note, *Cases Moot On Appeal: A Limit on the Judicial Power*, 103 U. Pa. L. Rev. 772 (1955). Thus, this Court may not deliver advisory opinions. Similarly, this Court may not consider the merits of a moot case. *See Powell v. McCormack*, 395 U. S. at 496 n. 7. "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Id.* at 496.

Since March 14, 1972 when Forbes caused a bond to be filed with the District Court it has had full and unrestricted use of the funds. Were Forbes to prevail in this Court, it would in no way benefit, since it has already obtained dissolution of the attachment. Petitioner has "nothing to gain from a decision in his favor", Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 U. Pa. L. Rev. 772, 773 (1955); the issue is no longer "live" and Forbes has no "legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U. S. 496. Thus the appeal has become, by definition, moot.

B. The Decision Below Is Clearly Correct, and Does Not Present a Substantial Federal Question.

1. The Pennsylvania Foreign Attachment Procedures Assure Procedural Due Process.

It is settled that due process does not require a pre-seizure hearing in all cases but rather demands that there be a reasonable opportunity to be heard and present a defense in some meaningful time and in some meaningful manner. *See Grannis v. Ordean*, 234 U. S. 385 (1914); *Coffin Brothers v. Bennett*, 277 U. S. 29 (1927); *Phillips v. Commissioner*, 283 U. S. 589 (1931); *Armstrong v. Manzo*, 380 U. S. 545 (1965); *Boddie v. Connecticut*, 401 U. S. 371 (1971).

"Due process requires that there be an opportunity to present every available defense; but it need not be before the entry of judgment." *American Surety Company v. Baldwin*, 287 U. S. 156, 168 (1932). *Cf. D. H. Overmyer Co. v. Frick Co.*, 405 U. S. 174 (1972).

Due process does not require the same procedural rule in all cases: "A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case." *Bell v. Burson*, 402 U. S. 535, 540 (1971).

In *Sniadach* only a pre-attachment hearing would satisfy due process. The garnishment of wages was so onerous that the debtor was under pressure to pay the debt and collection charges or sign a new contract which incorporated the additional charges without further resort to the Courts. The debtor simply could not take advantage of whatever post-garnishment procedures were available because of the catastrophic effect of wage attachment. In short, the means by which suit was instituted foreclosed, as a practical matter, the right to assert a defense.

Wages and salaries have been exempt from foreign attachment in Pennsylvania since 1845, *Sheryl Records, Inc. v. The Cyrkle*, 431 Pa. 299, 245 A. 2d 454 (1968).

The Pennsylvania Foreign Attachment Rules provide several post-attachment procedures by which the property attached may be immediately released:

(1) Forbes had the right to file a bond in double the amount of the Plaintiff's claim or *in such lesser amount as the Court may direct.* (Pa. R. Civ. P. 1272c);

(2) Forbes had the right to immediately petition the Court to release part of the attached property if the value of the property attached was excessive compared to the amount in controversy. (Pa. R. Civ. P. 1272h);

(3) If Forbes was concerned that the amount of Lebowitz's claim was inflated it had the right to immediately petition the Court and present evidence to show that the "amount in controversy" did not justify the amount attached.

In fact, Forbes did eventually file a bond *in the amount of the attachment.* See Stipulation (SA 4-SA 5).

It is thus clear that the Pennsylvania Rules did fulfill the requirements of due process by affording Petitioner a "meaningful opportunity to be heard" within the limits of practicability. *Boddie v. Connecticut*, 401 U. S. 371, 379 (1971).

2. *Sniadach* Was Based on a Denial of Due Process Caused by a Procedure So Onerous as to Preclude the Individual Debtor From Receiving a Meaningful Hearing. The Procedure Herein Did Not Deprive Petitioner of a Meaningful Hearing.

Sniadach clearly indicated that it was not reviewing a broad spectrum of creditor remedies, but rather a particular problem with particularly egregious consequences.

> "We deal here with wages—a specialized type of property presenting distinct problems in our economic system. . . .
>
> A prejudgment garnishment of the Wisconsin type is a taking which may impose tremendous hardship on wage earners with families to support. Until a recent Act of Congress, § 304 of which forbids discharge of employees on the ground that their wages have been garnished, garnishment often meant the loss of a job. Over and beyond that was the great drain on family income. As stated by Congressman Reuss:
>
> > 'The idea of wage garnishment in advance of judgment, of trustee process, of wage attachment, or whatever it is called is most inhuman doctrine. It compels the wage earner, trying to keep his family together, to be driven below the poverty level.'
> >
> > . . .
>
> The result is that a pre-judgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall." 395 U. S. at 340-42 (footnotes omitted).

Later decisions of this Court have further emphasized the limitation of the *Sniadach* rule to similar situations

where an individual's ability to support his family is seriously impaired.

Because of the "brutal need" of families receiving welfare assistance, *Goldberg v. Kelly*, 397 U. S. 254 (1970), held that a pre-termination hearing was required. See also *Bell v. Burson*, 402 U. S. 535 (1971) (suspension of driver's license when "essential in the pursuit of a livelihood").

The situation in the present case is clearly outside the scope of *Sniadach* and the later cases.

Forbes' failure to present any evidence whatsoever of the effect of the attachment and its ability to wage expensive litigation for almost 1½ years before filing a Bond hardly supports its attempted analogy.

Forbes is not a wage earner, but a wholly owned subsidiary of Network Cinema Corporation. It is in the business of obtaining financial commitments. There is no reasonable analogy between Forbes and a wage-earning family which is "driven to the wall", an indigent welfare recipient deprived of benefits, or an individual deprived of a driver's license essential in the pursuit of his livelihood. The "distinct problems" of wage garnishment considered in *Sniadach* simply are not present in this case, and *Sniadach* is not applicable.

Furthermore, even if the analogy could be drawn to a business corporation unable to receive a meaningful hearing there is absolutely no evidence that Petitioner was at all hampered by the attachment; in fact, *it chose not to dissolve the attachment* until after the decision of the Court of Appeals even though it admittedly could have afforded to post bond from the beginning. See Opinion of the District Court (App. A32).

Petitioner, a corporation, was in no way prevented from receiving a meaningful hearing. The citation by Judge Becker of a few lower court cases purporting to ex-

tend *Sniadach* is heavily outweighed by decisions limiting *Sniadach* to the garnishment of wages. *See Johnson v. Cunningham*, 12 Cal. App. 3d 123, 90 Cal. Rptr. 487 (1970); *Termplan, Inc. v. Superior Court*, 105 Ariz. 270, 463 P. 2d 68 (1969); *Andrew Brown Co. v. Painters Warehouse, Inc.*, 11 Ariz. App. 571, 466 P. 2d 790 (1970); *American Olean Tile Co. v. Zimmerman*, 317 F. Supp. 150 (D. C. Ha. 1970); *Black Watch Farms, Inc. v. Dick*, 323 F. Supp. 100 (D. Conn. 1971); *Brunswick Corp. v. J & P, Inc.*, 424 F. 2d 100 (10th Cir. 1970); *Fuentes v. Faircloth*, 317 F. Supp. 954 (S. D. Fla. 1970); *In Re 300 W. 15th St. Realty Co.*, 26 N. Y. 2d 538, 260 N. E. 2d 534 (1970).

3. The Pennsylvania Foreign Attachment Rules Serve a Legitimate Governmental and Creditor Interest in the Present Case.

Forbes recognizes that "[t]he state has a valid interest in protecting its residents so that they may assert within the state claims against non-residents doing business within the state." (Petition at 9). Yet it then argues that the two ways in which the attachment rules protect Pennsylvania residents are invalid. Of course, the state and creditor interests are greatest before the court has obtained personal jurisdiction. Petitioner does not contest the validity of the interest in obtaining personal jurisdiction; but instead argues that foreign atttachment is an unconstitutional method of doing so because there are alternative means—Pennsylvania's "long-arm" statute. 15 Pa. Stat. § 2011 (1961). However, as the Court of Appeals recognized (App. A5-A6), the attachment procedures serve a valid state and creditor interest by providing an "immediate and certain" basis for jurisdiction over a non-resident defendant; in doing so it "constitutes a greater inducement for such a defendant to appear." Service by long-arm

statute can be contested, depositions may be taken to show the unavailability of the long-term statute while the nonresident defendant removes his property from the state.

Even after jurisdiction has been obtained, however, there remains an interest in assuring that a judgment obtained can be satisfied. Although the debtor may be subject to the jurisdiction of the Court, the creditor's interests are hardly protected if any judgment which is obtained cannot be satisfied, or can only be satisfied after further costly and troublesome litigation. Thus it has long been recognized that there is a valid state and creditor interest in preserving property within the jurisdiction in order to satisfy a judgment obtained against the debtor. *Cf., e.g., McKay v. McInnes*, 279 U. S. 820 (1929), *affirming* 127 Me. 110, 141 A. 699 (1928).

This case is precisely the kind of case for which the Foreign Attachment Rules are necessary and appropriate. Petitioner is a Delaware Corporation which is not registered to do business in Pennsylvania. Its facilities in Pennsylvania are nonexistent, and the balance of the checking account could easily have been withdrawn, and by now probably has been withdrawn. It is a wholly owned subsidiary of Network Cinema Corp., also a defendant, and is no more than a bag of assets which can be emptied at the will of its parent.

In the circumstances of this case, it is clear that the Foreign Attachment Rules appropriately serve valid state and creditor interests.

4. There Is No Conflict Between the Decision Below and the Decision of the Supreme Court of California on an Issue of Federal Constitutional Law.

Petitioner argues that the decision of the Supreme Court of California in *Randone v. Appellate Department*

of the Superior Court, 5 Cal. 3d 536, 488 P. 2d 13, 96 Cal. Rptr. 709 (1971), *petition for cert. filed sub nom. Northern California Collection Services, Inc. v. Randone*, 40 U. S. L. W. 3375 (U. S. Jan. 11, 1972), conflicts with the decision of the Court of Appeals here. Although *Randone* does deal with an attachment proceeding, that case does not conflict with the decision below for two reasons.

a. *Randone* Rests Upon Adequate and Independent Nonfederal Grounds.

It is established law that this Court will not review state court judgments which rest on adequate and independent nonfederal grounds, notwithstanding the presence of federal grounds; *e.g., Department of Mental Hygiene of California v. Kirchner*, 380 U. S. 194 (1965); *Henry v. Mississippi*, 379 U. S. 443, 447 (1965). Like the California Supreme Court opinion in *Kirchner*, 60 Cal. 2d 716, 388 P. 2d 720, 36 Cal. Rptr. 488 (1964), the opinion in *Randone* was based on both the California and Federal Constitutions. Article I, Section 13 of the California Constitution contains language virtually identical to the Due Process Clauses of the Federal Constitution (Amendments 5 and 14). Thus, despite its holding that the case is also based on the Federal Constitution, the court in *Randone* must be regarded as primarily basing its holding on the State Constitution—an adequate and independent nonfederal ground. *Cf. Department of Mental Hygiene of California v. Kirchner*, 380 U. S. 194 (1965).

b. *Randone* Is Clearly Distinguishable From the Decision Below.

Unlike the decision below, *Randone* involved the attachment of property of *persons* who were *residents* of the state. The record in *Randone* contained evidence of the

hardship caused the Randones by the attachment—evidence that the attachment could result in impairment of their ability to participate effectively in the judicial proceedings. Furthermore, the governmental and creditor interests were slight—the Randones were unlikely to move from the state simply to make a judgment in the case uncollectable.

By contrast, Forbes is a corporation. There is no evidence of any hardship caused by the attachment. Even if, as alleged by Petitioner, 40% of its assets were attached, there is no evidence that the attachment impaired Petitioner's ability to participate in judicial proceedings. And even if Forbes was impaired, the impairment was at its own choosing. As noted in the opinion of the District Court (App. A32), Petitioner could in fact afford the bond.

Similarly, the governmental and creditor interests in this case are much stronger than in *Randone*. Petitioner is a Delaware Corporation which is not registered to do business in Pennsylvania. Its facilities in Pennsylvania are nonexistent, and the danger of such a debtor removing its property from the jurisdiction is quite real. This danger was greatest before the Entry of Appearance; however, even after personal jurisdiction has been obtained, the creditor's interests are hardly protected if the property can be removed from the jurisdiction, thus posing a reasonable possibility that any judgment would go unsatisfied. The circumstances of this case are such that in the absence of the attachment it would be simple and easy for Petitioner to remove its property from the jurisdiction. Thus, as distinguished from *Randone*, here there is a substantial governmental and creditor interest which is served.

C. This Case Presents No Substantial Questions Under the Fourth Amendment.

Petitioner argues that the Pennsylvania Foreign Attachment Rules lead to a seizure of a bank account by a state officer which constitutes a violation of the Fourth

Amendment. It asserts that "The purpose of the Fourth Amendment is to make people secure in their houses and possessions." (Petition at 21). Yet Petitioner cites no authority for the proposition that the attachment of a bank account is an unconstitutional seizure under the Fourth Amendment, if indeed it is a seizure at all in the constitutional sense.

Both courts below found no merit in Petitioner's Fourth Amendment arguments and disposed of them without discussion. These Fourth Amendment arguments are entirely without merit, and present no significant constitutional questions.

VII. CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Philadelphia, Pa. 19109,
Attorneys for Respondent.

Of Counsel:
MESIROV, GELMAN, JAFFE
& LEVIN.

Certificate of Service.

I hereby certify that on this 9th day of June, 1972, three copies of this Brief in Opposition to Petition for a Writ of Certiorari were hand delivered to the office of Lawrence Silver, Esquire, Dilworth, Paxson, Kalish, Levy and Coleman, 2600 Fidelity Building, Philadelphia, Pennsylvania 19109.

I further certify that all parties required to be served have been served.

HENRY A. STEIN,
1510 Fidelity Building,
Philadelphia, Pa. 19109,
Attorney for Respondent.

SUPPLEMENTAL APPENDIX.

United States Constitution, Article III, Section 2, Clause 1:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

California Constitution, Article I, Section 13:

> . . . No person shall be twice put in jeopardy for the same offense; nor compelled in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law. . . .

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 71-369.

MARVIN LEBOWITZ,

Plaintiff

v.

FORBES LEASING AND FINANCE CORPORATION (A FOREIGN CORP.); BENJAMIN OGUREK; ORCHID FARALES; NETWORK CINEMA CORPORATION AND JERRY ENTMAN,

Defendants

AND

THE FIRST PENNSYLVANIA BANKING AND TRUST COMPANY, ET AL.,

Garnishees.

ORDER.

Upon the motion of the defendant, Forbes Leasing and Finance Corporation, and upon consent of counsel for the plaintiff and the said defendant and The First Pennsylvania Banking and Trust Company, one of the Garnishees, it is hereby ordered this 8th day of June, 1971:

1. That the said Garnishee, The First Pennsylvania Banking and Trust Company, shall transfer the balance in the checking account of Forbes Leasing and Finance Corporation (Account No. 371-565-3) in the amount of $4,293.34, less the sum of $26.50 as the Garnishee's attorney's fee of $25.00 and costs of $1.50 to be paid to Saul, Ewing, Remick and Saul, attorneys for the said Garnishee, or the net amount of $4,266.84

to account No. 2-360-667 in Girard Trust Bank, another Garnishee.

2. That upon said transfer the attachment as to The First Pennsylvania Banking and Trust Company, Garnishee, only shall be dissolved and the said Garnishee shall no longer be a party to this proceeding.

3. The fund so transferred to the account at Girard Trust Bank shall remain subject to the attachment and all interest accruing thereon together with the principal thereof shall not be distributed or in any manner released pending further order of this Court or except as provided by the applicable Pennsylvania Rules of Civil Procedure.

.....

EDWARD R. BECKER, *J.*

CONSENT:

.....

LAWRENCE SILVER,
Counsel for Defendant,
Forbes Leasing and Finance Corporation.

.....

HENRY A. STEIN,
Counsel for Plaintiff,
Marvin Lebowitz.

.....

GORDON W. GABELL of SAUL, EWING, REMICK & SAUL,
Counsel for Garnishee, The First Pennsylvania Banking and Trust Company.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 71-369.

MARVIN LEBOWITZ,

Plaintiff,

v.

FORBES LEASING AND FINANCE CORPORATION (A FOREIGN CORP.); BENJAMIN OGUREK; ORCHID FARALES; NETWORK CINEMA CORPORATION AND JERRY ENTMAN,

Defendants.

STIPULATION.

FILED MARCH 14, 1972.

AND NOW, this 14th day of March, 1972, pursuant to Rule 64 F. R. C. P. and therefore pursuant to Rule 1272 Pa. F. R. C. P., it is hereby stipulated by plaintiff Marvin Lebowitz and defendant Forbes Leasing and Finance Corporation, by and through their counsel, as follows:

1. Defendant Forbes Leasing and Finance Corporation shall cause Fidelity and Deposit Company of Maryland to file a bond in the amount of $78,083.09 with the Clerk of the United States District Court for the Eastern District of Pennsylvania.

2. Upon the filing of such bond, all of the assets of defendant Forbes Leasing and Finance Corporation

in the possession or control of garnishee Girard Bank be and the same hereby are released, and the attachment as against Girard Bank be and the same hereby is dissolved.

3. Upon the said filing, garnishee, Girard Bank, be and the same hereby is dismissed, without prejudice, from the above-captioned litigation.

.....

HENRY STEIN,
Counsel for Plaintiff, Marvin Lebowitz.

.....

LAWRENCE SILVER,
Counsel for Defendant, Forbes Leasing and Finance Corporation.

SO ORDERED, this 14th day of March, 1972:

/s/ EDWARD R. BECKER,
EDWARD R. BECKER,
United States District Court Judge.

E COPY

Supreme Court, U. S.
FILED
JUN 22 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-1403.

FORBES LEASING AND FINANCE CORPORATION,
Petitioner,

v.

MARVIN LEBOWITZ,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF.

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INDEX TO BRIEF.

	Page
I. Introduction	1
II. Argument	1
A. The Petition Is Not Moot as Petitioner Still Suffers and Shall Continue to Suffer Adverse Consequences From the Unconstitutional Attachment of Its Property	1
B. This Court's Decision in *Fuentes v. Shevin*, — U. S. —, 40 U. S. L. W. 4692 (June 12, 1972) Puts to Rest Respondent's Objections to the Granting of the Petition for a Writ of Certiorari	3
1. Pennsylvania's Foreign Attachment Procedures Do Not Assure Procedural Due Process by Providing for Post Attachment Relief	4
2. The Procedural Due Process Rules Prohibiting Deprivation of Property Absent Notice and a Prior Hearing Reiterated in *Sniadach* Are Not Limited to Wages	4
3. Pennsylvania's Foreign Attachment Rules Are Not Sufficiently Narrowly Drawn to Protect Any State or Creditor Interest	5
4. This Court Has Already Recognized the Substantiality of Petitioner's Fourth Amendment Claim	6
III. Conclusion	7

TABLE OF CASES CITED.

	Page
Fuentes v. Faircloth, 317 F. Supp. 954 (S. D. Fla. 1970)	4
Fuentes v. Shevin, — U. S. —, 40 U. S. L. W. 4692 (June 12, 1972)	1, 2, 3, 4, 5, 6
Jones Press, Inc. v. Motor Travel Services, Inc., 286 Minn. 205, 176 N. W. 2d 87 (1970)	2
McKay v. McInnes, 279 U. S. 820 (1929)	5
Ownbey v. Morgan, 256 U. S. 94 (1921)	5
Sniadach v. Family Finance Corp., 395 U. S. 337 (1969)	4

RULES OF CIVIL PROCEDURE CITED.

	Page
Pennsylvania Rule of Civil Procedure, 1256	2

I. INTRODUCTION.

The purpose of this Reply Brief is to answer Respondent's incorrect suggestion of mootness, to demonstrate the applicability of the recent case of *Fuentes v. Shevin*, — U. S. —, 40 U. S. L. W. 4692 (June 12, 1972) and to suggest reversal upon these papers.

II. ARGUMENT.

A. The Petition Is Not Moot as Petitioner Still Suffers and Shall Continue to Suffer Adverse Consequences From the Unconstitutional Attachment of Its Property.

Respondent, Lebowitz, has contended that because Forbes has posted a bond releasing the previously attached property this case is now moot. Respondent claims that Forbes has nothing to gain by victory in this Court (Respondent's Brief, p. 6). Obviously, Forbes would not have filed a costly Petition if it had nothing to gain. As Judge Becker stated in his Opinion below (App. A32-33), the posting of a bond would not and does not relieve the adverse consequences of an attachment:

> 1. Forbes secured a release of the funds presently attached by paying the annual bond premium of $1,560.00.[1] Each year that this litigation is pending Forbes shall be further obligated to pay $1,560.00.[2]

---

1. Necessarily some of the facts contained herein occurred after the record was closed in the lower Court. Although the cost of the annual premium is not of record, Judge Becker stated (App. A38) that if Forbes posted a bond it would have to "advance a substantial premium".

2. This litigation may be pending for a number of years. See Judge Becker's Opinion at A33:

> "It is true that the debtor may have the attachment dissolved by being successful in the law suit. Suffice it to say that in a contemporary metropolitan area, the Court backlog may prevent this method of dissolution for several years."

2. The posting of the bond pursuant to the stipulation of Counsel (App. SA4-SA5) and the applicable Pennsylvania Rule of Civil Procedure, 1256 (App. A58), does not prohibit Respondent from attaching an additional $120,000.00 of Petitioner's property pending the outcome of this litigation.[3] As Judge Gibbons (App. A7) observed, the impact of this threat of further attachment offends the Commerce Clause (App. A53) as Forbes must run the risk of the seizure of more of its property if it wishes to do business in Pennsylvania while this litigation is pending.

3. As Judge Becker in his Opinion below noted (App. A32; A38), the posting of a bond does not give Petitioner "full and unrestricted use of the funds . . ." as Respondent contends:[4]

> "The problem is that posting a bond involves more than paying a premium. The Court takes judicial notice of the fact that surety companies, more often than not, require security for posting of a bond which may take the form of cash or other property. *The existence of the bond obligation would have to appear on the accounting records of the corporation and, in many cases, would impair its credit standing.*" (App. A32) [Emphasis added.]

The incorrectness of Respondent's mootness contention is demonstrated by *Jones Press, Inc. v. Motor Travel Services, Inc.*, 286 Minn. 205, 176 N. W. 2d 87 (1970) cited with approval by this Court in *Fuentes v. Shevin*, — U. S. —, 40

3. Respondent's Writ of Attachment allows the seizure of a total of $200,000.00 (App. A12). Respondent has already caused approximately $78,000.00 to be seized (App. SA4).

4. Respondent's Brief, p. 6.

U. S. L. W. 4692, 4694 n. 5 (June 12, 1972). There a unanimous Supreme Court of Minnesota declared Minnesota's general attachment statute unconstitutional because the statute did not provide for prior notice and hearing. Defendant there posted a bond to secure the release of the attached property, accounts receivable.

> "Plaintiff argues that by posting a bond and releasing the garnishments defendant has waived its right to challenge the validity of the statute and has rendered the issue moot. We do not subscribe to that contention. The economic burden which defendant has sustained to achieve this result is one which stems directly from the garnishment proceedings. *It inflicts a hardship which is different only in form and not in substance.*" [Emphasis added.]

Contrary to Respondent's mootness contention, the issues are alive and ripe for consideration by this Court.

B. This Court's Decision in *Fuentes v. Shevin*, — U. S. —, 40 U. S. L. W. 4692 (June 12, 1972) Puts to Rest Respondent's Objections to the Granting of the Petition for a Writ of Certiorari.

In *Fuentes v. Shevin*, — U. S. —, 40 U. S. L. W. 4692 (June 12, 1972) this Court declared the replevin statutes of Pennsylvania and Florida unconstitutional because both replevin statutes provided for a seizure property absent notice and a prior hearing. In this connection the replevin statutes are identical to Pennsylvania's foreign attachment procedure.[5]

---

5. In fact, the replevin statutes in *Fuentes, supra*, were more protective of defendant's interests in that both statutes required plaintiff to post a bond. Pennsylvania's foreign attachment procedure does not require plaintiff to post any bond.

1. Pennsylvania's Foreign Attachment Procedures Do Not Assure Procedural Due Process by Providing for Post Attachment Relief.

Respondent has asserted (Respondent's Brief, pp. 7-8) that because the Pennsylvania foreign attachment procedure provides for post attachment relief that procedural due process has been accorded. To the contrary, *Fuentes v. Shevin*, — U. S. —, 40 U. S. L. W. at 4696 held:

> "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. . . . But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone'. Stanley v. Illinois, — U. S. —, —."

2. The Procedural Due Process Rules Prohibiting Deprivation of Property Absent Notice and a Prior Hearing Reiterated in *Sniadach*[6] Are Not Limited to Wages.

Respondent has contended here and below that *Sniadach* announced a new due process rule prohibiting pre-notice and pre-hearing seizures of one type of property *viz.* wages (Respondent's Brief, pp. 9-11).[7] To the contrary, this Court in *Fuentes, supra*, at 4698 held:

> "*Sniadach* and *Goldberg* . . . were in the mainstream of past cases, having little or nothing to do with

---

6. *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969).

7. Respondent relies on *Fuentes v. Faircloth*, 317 F. Supp. 954 (S. D. Fla. 1970) for this contention. Obviously, this reliance is misplaced as this Court has reversed: *Fuentes v. Shevin*, — U. S. —, 40 U. S. L. W. 4692 (June 12, 1972).

the absolute 'necessities' of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect. *E.g., Opp Cotton Mills v. Administrator,* 312 U. S. 126, 152-153; *United States v. Illinois Cent. R. Co.,* 291 U. S. 457, 463; *Southern Ry. Co. v. Virginia,* 290 U. S. 190; *Londoner v. City & County of Denver,* 210 U. S. 373; *Central of Georgia v. Wright,* 307 U. S. 127; *Security Trust Co. v. Lexington,* 203 U. S. 323; *Hibben v. Smith,* 191 U. S. 310; *Glidden v. Harrington,* 189 U. S. 255. In none of those cases did the Court hold that this most basic due process requirement is limited to the protection of only a few types of property interests. While *Sniadach* and *Goldberg* emphasized the special importance of wages and welfare benefits, they did not convert that emphasis into a new and more limited constitutional doctrine." [Footnotes omitted.]

3. Pennsylvania's Foreign Attachment Rules Are Not Sufficiently Narrowly Drawn to Protect Any State or Creditor Interest.

Respondent has contended (Respondent's Brief, pp. 11-12) that Pennsylvania's foreign attachment rules serve the governmental and creditor interest of providing personal jurisdiction. Respondent has relied upon *Ownbey v. Morgan,* 256 U. S. 94 (1921) and *McKay v. McInnes,* 279 U. S. 820 (1929). This Court in *Fuentes v. Shevin,* — U. S. —, 40 U. S. L. W. at 4699 n. 23 limited *McKay* to holding nothing more than *Ownbey.* As for *Ownbey* this Court said the seizure there was "*necessary* to secure jurisdiction in state court [Emphasis added]." Such is not the case here where Pennsylvania had jurisdiction over Forbes by way of long-arm statute (App. A5-A6; A36).

The question left open by *Fuentes,* deemed important by the Third Circuit (App. A6) and not dealt with by Re-

spondent in his brief is Forbes' alternative ground that the state lacks interest in the maintenance of attachments after jurisdiction has been secured by the defendant's general appearance, see Petition at p. 9.

4. This Court Has Already Recognized the Substantiality of Petitioner's Fourth Amendment Claim.

Petitioner asserts that Pennsylvania's foreign attachment rules are in violation of the Fourth Amendment (Petition at p. 20) and contrary to the contention raised by Respondent in his brief at p. 14 the Fourth Amendment issue raises a substantial federal constitutional question. This Court has recognized the substantiality of that Fourth Amendment contention, *Fuentes v. Shevin*, — U. S. —, — n. 2, — n. 30, — n. 32; 40 U. S. L. W. 4692, 4693 n. 2, 4700 n. 30, 4701 n. 32 (June 12, 1972). Although this Court recognized the substantiality of such a Fourth Amendment claim, it did not rule on that claim in *Fuentes, supra*. The resolution of this question was clearly reserved and should be the basis, *inter alia*, for granting the Petition of Writ of Certiorari in this case.

III. CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for a Writ of Certiorari and set this case for briefing and argument or reverse on these papers.

Respectfully submitted,

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Of Counsel:
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& COLEMAN.

Certificate of Service.

I hereby certify that on this 22nd day of June, 1972 three copies of this Reply Brief were hand delivered to the office of Henry Stein, Esquire, Mesirov, Gelman, Jaffe and Levin, 1510 The Fidelity Building, Philadelphia, Pennsylvania 19109.

I further certify that all parties required to be served have been served.

LAWRENCE SILVER,
2600 The Fidelity Building,
Philadelphia, Penna. 19109
Attorney for the Petitioner

Petitioner, Forbes Leasing and Finance Corporation, herewith files this Petition for Rehearing of the order of this Court dated October 10, 1972, which denied the Petition for a Writ of Certiorari and in support thereof states as follows:

1. On April 26, 1972, petitioner filed a Petition for Writ of Certiorari to review a judgment of the Court of Appeals for the Third Circuit, which judgment was entered on February 24, 1972.

2. This Court, on October 10, 1972, filed an order denying the Petition for Writ of Certiorari.

3. The Petition for Writ of Certiorari sought review of the judgment of the Court of Appeals for the Third Circuit which upheld the constitutionality of the Pennsylvania foreign attachment procedure. Pennsylvania Rules of Civil Procedure, Foreign attachment, Rules 1251 through 1279, inclusive (Petition for Writ of Certiorari, App. A56-A70). This procedure permits plaintiff to commence a suit by seizure of property on a perfunctory writ issued automatically by the prothonotary (court clerk) at the request of plaintiff's counsel and permits its service by the sheriff without any prior notice to the defendant, without any prior hearing, without any affidavit of meritorious action, without the prior posting of any bond by plaintiff and without any prior intervention by any judicial officer. Such suit can be commenced by writ of foreign attachment even though the court has personal jurisdiction over the defendant because the defendant is doing business in the Commonwealth of Pennsylvania, or otherwise is subject to personal service. Thus there is no reason to use attach-

ment or garnishment to achieve jurisdiction. Moreover, said attachment or garnishment is not dissolved by the general appearance of the defendant and, unless a bond in double the amount claimed or equivalent security is posted, the attachment remains in effect until final disposition of the case. As stated in the Petition for Writ of Certiorari, the District Judge as well as all three Judges of the Court of Appeals for the Third Circuit believed that Pennsylvania's foreign attachment scheme is repugnant to the Constitution of the United States but felt constrained to uphold it only because of the failure of this Court to state in *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969) that *Ownbey v. Morgan*, 256 U. S. 94 (1921) and *McKay v. McInnes*, 279 U. S. 820 (1929) were overruled. *Ownbey* and *McKay* were, of course, decided long before the numerous decisions of this Court which have required an exacting standard of due process and equal protection, through effective hearing of a party's defenses, as required by the Fourteenth Amendment to the Constitution of the United States.

4. *After* the Reply Brief herein was filed on June 22, 1972 (before the June, 1972 adjournment of this Court), a three-judge court of the United States District Court for the District of Massachusetts held that a comparable Massachusetts statute violated the due process requirements of the Fourteenth Amendment. This decision is in *Schneider v. Margossian*, with an opinion dated September 22, 1972, written by Judge Garrity. Petitioner's counsel did not become aware of this case until a day ago since it was first called to his attention by publication in the United States Law Week for October 17, 1972, 41 U. S. L. W. 2189. Under long-standing practice, most civil actions in Massachusetts may be commenced by attaching

a defendant's property. Under this procedure a plaintiff simply fills in the blanks of a writ averring that the defendant is liable to him for a certain amount on a particular cause of action; the writ then directs the appropriate officer to attach the property of the defendant in the defendant's hands or in the hands of another. Although the defendant receives notice of the attachment shortly after it is made, there is no provision whereby he can contest an attachment before it is made. As stated above, the three-judge court declared such statute unconstitutional. This statute is identical to the Pennsylvania foreign attachment statute here under attack.

5. Thus a three-judge court in the District Court for the District of Massachusetts has decided a case in a manner which is in direct conflict with the decision of the Third Circuit here under review. Clearly the losing party in the *Schneider* case will seek review by appeal in this Court, which review, under 28 U. S. C. § 1253 is of right.

6. Since there is now a direct conflict between the decision in the Third Circuit and a three-judge court decision in Massachusetts, this Court should grant this Petition for Rehearing in the case at bar. In the alternative, this Court should hold this Petition for Rehearing until there is final disposition in *Schneider v. Margossian* and apply the result in that case to the case at bar.

WHEREFORE it is prayed that, based upon the Petition for Rehearing, a Petition for Writ of Certiorari be granted and, if and when the defendant therein files a Jurisdictional Statement and probable jurisdiction is noted pursuant thereto, this case be set down for argument along with

Schneider v. Margossian, 41 U. S. L. W. 2189 (U. S. D. C. Massachusetts, Sept. 22, 1972). If the defendant in the *Schneider* case does not seek review in this court, then argument nevertheless should be heard to resolve the conflict which clearly exists.

Respectfully submitted,

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Dated: November 1, 1972.

Certificate of Counsel.

WILLIAM T. COLEMAN, JR., herewith certifies that he is a member of the bar of this Court, that he is attorney for Petitioner in this matter and that this Petition for Rehearing is filed because of a new precedent which came to his attention after the Reply Brief was filed and is not for the purpose of delay.

WILLIAM T. COLEMAN, JR.